Supreme Court, U.S.
FILED
JUL 25 2003

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No. ___

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 25, 2003

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QUESTION PRESENTED

Section 1(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b), confers jurisdiction on the Federal Energy Regulatory Commission ("FERC") to regulate the transportation of natural gas in interstate commerce. It exempts from FERC jurisdiction the "production or gathering of natural gas." This Court has held that "production and gathering are * * * narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

The question presented is whether the FERC's new "central point of aggregation" jurisdictional test, which makes no attempt to define the end-point of gathering on major pipelines in the Gulf of Mexico at or near the point where gas is prepared for the first stages of distribution, and has removed substantial portions of offshore pipelines from the FERC's NGA jurisdiction, is contrary to this Court's interpretation of NGA § 1(b) in *Northern Natural*.

LIST OF PARTIES

The following parties participated in the appeals of the orders of the Federal Energy Regulatory Commission before the United States Court of Appeals for the District of Columbia Circuit:

Amerada Hess Corporation
Amoco Energy Trading Corporation
Amoco Production Company
Anadarko Petroleum Corporation
Baltimore Gas and Electric Company
Boston Gas Company
BP America Production Company
Brooklyn Union Gas Company
Burlington Resources Oil & Gas Company, L.P.
Chevron U.S.A., Inc.
Colonial Gas Company
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing and Trade
Energy North Natural Gas, Inc.
Essex Gas Company
Exxon Mobil Corporation
ExxonMobil Gas Marketing Company
Federal Energy Regulatory Commission
Forest Oil Corporation
Houston Exploration Company
KeySpan Gas East Corporation
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
Producer Coalition
Shell Offshore, Inc.

Sunoco, Inc. (R&M)
Texaco Exploration and Production, Inc.
Texaco Natural Gas, Inc.
TOTAL E&P USA, Inc.
Transcontinental Gas Pipe Line Corporation
Williams Gas Processing—Gulf Coast Company, L.P.

The following additional parties participated in the administrative proceeding before the Federal Energy Regulatory Commission:

AGL Resources, Inc.
Alabama Gas Corporation
Atlanta Gas Light Company
BP Energy Company
Cabot Oil & Gas Corporation
Calpine Energy Services, L.P.
Carolina Power & Light Company
Cherokee County Cogeneration Partners LP
Clinton Newberry Natural Gas Authority
CoEnergy Trading Company
Columbia Gas of Virginia
Columbia Gulf Transmission Corporation
Coral Energy Resources, L.P.
Conoco Gas and Power Marketing
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Danville, City of
Delmarva Power & Light Company
Destin Pipeline Company, L.L.C.
Dominion Transmission, Inc.
Duke Energy
Duke Energy Field Services, Inc.
Duke Energy Trading & Marketing, LLC
Dynegy, Inc.
East Tennessee Natural Gas Company
El Paso Corporation

EnCana Energy Services, Inc.
Enron North America Corporation
Enterprise Oil Gulf of Mexico Inc.
Florida Gas Transmission Company
Fort Hill Natural Gas Authority
Fountain Inn, City of
FPL Energy, L.L.C.
Gulf South Pipeline Company, LP
Independent Petroleum Association of America
Iroquois Gas Transmission System, L.P.
Johns Hopkins University
Johns Hopkins University Health Systems
Kanawha County Commission
Kerr-McGee Oil & Gas Corporation
KeySpan Delivery Companies
KeySpan Energy
Mirant Americas Energy Marketing, L.P.
Motiva Enterprises LLC
New Jersey Energy Associates
New Jersey Natural Gas Company
Niagara Mohawk Power Corporation
North Carolina Natural Gas Corporation
North Carolina Utilities Commission
Northeast Energy Associates
NUI Corporation
NUI Utilities, Inc.
PanEnergy Dauphin Island, LLC
PECO Energy Company
Pennsylvania Office of Consumer Advocate
PG Energy Inc.
Philadelphia Gas Works
Phillips Petroleum Company
Piedmont Natural Gas Company
PLC II, LLC
Process Gas Consumers Group
Public Service Commission State of New York

Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Company
Richmond, City of
Rochester Gas & Electric Corporation
SCANA Services, Inc.
Shell Energy Services Company, L.L.C.
Shell Oil Company
Smurfit-Stone Container Corporation
South Carolina Pipeline Company
South Jersey Gas Company
Southern Company Services, Inc.
Southern Natural Gas Company
Superior Natural Gas Corporation
Tennessee Gas Pipeline Company
Texaco Group, Inc.
Texas Eastern Transmission Corporation
Transco Municipal Group
UGI Utilities, Inc.
United Cities Gas Company
University of Maryland - College Park
US Gypsum Co.
Virginia Natural Gas Company
Virginia Power Energy Marketing, Inc.
Walter Oil & Gas Corporation
Washington Gas Light Company

RULE 29.6 LISTING

The companies listed below, members of the Producer Coalition, are engaged in the exploration and production of oil and natural gas on the Outer Continental Shelf in the Gulf of Mexico ("OCS") and are shippers and marketers of gas on OCS pipelines, including the systems owned by Transcontinental Gas Pipe Line Corporation.

Devon Energy Corporation is a publicly traded company listed on the American Stock Exchange.

Dominion Exploration & Production, Inc. is a wholly-owned, indirect subsidiary of Dominion Resources, Inc., a publicly traded company listed on the New York Stock Exchange.

Forest Oil Corporation is a publicly traded company listed on the New York Stock Exchange.

The Houston Exploration Company is a publicly traded company listed on the New York Stock Exchange. KeySpan Energy Corporation, also a publicly traded company listed on the New York Stock Exchange, owns in excess of 10% of the shares of Houston Exploration.

Newfield Exploration Company is a publicly traded company listed on the New York Stock Exchange.

TOTAL E&P USA, Inc., formerly known as TotalFinaElf E&P USA Inc., is a wholly-owned, indirect subsidiary of TotalFinaElf S.A., which is a French *societe anonyme* whose American Depository Receipts are traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Williams Gas Processing–Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) (App. 1a-19a). The orders of the Federal Energy Regulatory Commission ("FERC") affirmed by the Court of Appeals, are reported at 96 FERC ¶ 61,115, *order on reh'g*, 97 FERC ¶ 61,296 (2001); 96 FERC ¶ 61,118, *order on reh'g*, 97 FERC ¶ 61,300 (2001); and 96 FERC ¶ 61,246, *order on reh'g*, 97 FERC ¶ 61,298 (2001).

JURISDICTION

The Court of Appeals had jurisdiction under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). The judgment of the Court of Appeals was entered on June 20, 2003.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption, for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

This is a follow-along petition[1] to the pending petitions in *Producer Coalition v. FERC*, No. 02-1215, and *ExxonMobil Gas Mktg. Co. v. FERC*, No. 02-1265, both seeking review of *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"). The issue in *ExxonMobil* and in this case is whether the FERC's central point of aggregation test for determining the jurisdictional status of pipeline facilities on the Outer Continental Shelf ("OCS") in the Gulf of Mexico is consistent with Section 1(b) of the Natural Gas Act ("NGA"). This Court in *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963) ("*Northern Natural*") and its progeny[2] has ruled that non-jurisdictional

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[1] The Petitioner, the Producer Coalition, is an *ad hoc* group of independent oil and gas producers that have substantial investment in exploration and production projects on the Outer Continental Shelf in the Gulf of Mexico and ship gas on numerous OCS pipelines. Its members include Devon Energy Corporation, Dominion Exploration & Production, Inc., Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, and TOTAL E&P USA, Inc.

[2] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 513-14 (1989); *Transcontinental Gas Pipeline Corp. v. State Oil &*

gathering under Section 1(b) is "narrowly confined to the physical acts of * * * preparing [the gas] for the first stages of distribution."

A. Background: The FERC's "Central Point of Aggregation Test" in *Sea Robin*

In response to a remand in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997), the FERC announced its new test for determining the jurisdictional status of major pipeline facilities located on the OCS in the Gulf of Mexico. *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 (1999), *reh'g denied,* 92 FERC ¶ 61,072 (2000) ("*Sea Robin*"). Under the "central point of aggregation" test, the dividing line between non-jurisdictional gathering and jurisdictional transportation facilities is generally found at the last major fork in the pipeline before it goes onshore.

The *Sea Robin* orders were affirmed by a divided panel of the Court of Appeals, whose judgment is the subject of the pending petitions in Nos. 02-1215 and 02-1265. The central point of aggregation test has become the rule of decision for FERC's determination of jurisdictional status of OCS pipelines and provides the rationale for the FERC's orders in this case.

B. The Transco Spindown Applications

Relying on the *Sea Robin* orders, in late 2000 and early 2001 Transcontinental Gas Pipe Line Corporation ("Transco") and its affiliate, Williams Gas Processing–Gulf Coast Co. ("Williams"), filed three sets of petitions with the FERC under Section 7(b) of the NGA seeking approval to transfer major portions of Transco's offshore natural gas

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Gas Bd., 474 U.S. 409, 422-23 (1986). *See also Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690-91 (1947) ("Exceptions to the primary grant of jurisdiction in [NGA § 1(b)] are to be strictly construed.").

pipeline facilities to Williams, and asking FERC to reclassify the systems, which had previously been certificated as jurisdictional transportation facilities, as exempt gathering facilities. App. at 6a. The petitions covered five different Transco systems constituting hundreds of miles of OCS pipeline.[3]

Applying its central point of aggregation test, the FERC granted the petitions in large measure.[4] App. at 6a. The result was the withdrawal of NGA jurisdiction over more than 600 miles of offshore pipeline, leaving producers captive to Transco's unregulated gathering affiliate.[5]

Each of the FERC's selected jurisdictional demarcation points, like the Vermilion Block 149 platform on Sea Robin, represents the last major fork in the OCS pipeline before it goes ashore. In all cases, the point of demarcation is downstream (in some cases, many miles downstream) of the platforms where the gas is treated and prepared for shipment on Transco's facilities.

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[3] The first petition covered Transco's North Padre Island ("NPI") and Central Texas ("CT") systems; the second covered Transco's North High Island ("NHI") and West Cameron ("WC") systems; and the third covered Transco's Central Louisiana ("CL") system.

[4] *Transco (NPI/CT)*, 96 FERC ¶ 61,115 at 61,429, *order on reh'g*, 97 FERC ¶ 61,296 (2001); *Transco (NHI/WC)*, 96 FERC ¶ 61,118 at 61,449, *order on reh'g*, 97 FERC ¶ 61,300 (2001); *Transco (CL)*, 96 FERC ¶ 61,246 at 61,966, *order on reh'g*, 97 FERC ¶ 61,298 (2001). The FERC found no central point of aggregation on the WC system (approximately 43 miles of pipeline), and therefore concluded that that system served a transportation function. *See Transco (NHI/WC)*, 96 FERC at 61,459-60.

[5] Over 270 pipeline miles were lost from the CT system; 22 from the NPI system; over 111 from the NHI system; and over 300 from the CL system. *Transco (NPI/CT)*, 96 FERC at 61,431; *Transco (NHI/WC)*, 96 FERC at 61,458; *Transco (CL)*, 96 FERC at 61,976-77.

Viewing any argument about its central point of aggregation test as a collateral attack on its *Sea Robin* orders,[6] the FERC made no effort to reconcile its jurisdictional dividing lines with *Northern Natural*'s construction of NGA § 1(b) that gathering is "narrowly confined to the physical acts of * * * preparing [the gas] for the first stages of distribution."

C. The Decision of the Court of Appeals

Relying on its earlier decision in *ExxonMobil*, the Court of Appeals reaffirmed the FERC's application of its central point of aggregation test (App. at 15a-16a) and reiterated that it would uphold any future FERC determinations in this regard unless "patently unreasonable." App at 19a. The court did not address Petitioner's claims that the FERC's test is contrary to this Court's interpretation of NGA § 1(b) in *Northern Natural.*

REASONS FOR GRANTING THE WRIT

By reaffirming *ExxonMobil* and upholding the orders below, the Court of Appeals has again departed from this Court's instruction in *Northern Natural* that non-jurisdictional gathering is "narrowly confined to the physical acts of * * * preparing [the gas] for the first stages of distribution." The decision below ratifies the FERC's abdication of its congressionally mandated duties and licenses the further dismantling of a regulatory scheme that for decades has governed the OCS and protected shippers from pipelines' exercise of market power.

Moreover, the case at bar removes any argument that may have existed over the suitability for review of the FERC's new jurisdictional test. Respondents in *ExxonMobil* argued

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[6] *Transco (NPI/CT), order on reh'g*, 97 FERC at 62,384; *Transco (NHI/WC), order on reh'g*, 97 FERC at 62,411; *Transco (CL), order on reh'g*, 97 FERC at 62,398.

that review would be premature because Sea Robin's continued ownership of the reclassified gathering facilities meant that the FERC retained the power to exercise "in connection with" NGA rate authority over those facilities. Here however, where the reclassified gathering facilities have been spun down to a non-jurisdictional affiliate, the FERC has ceded its NGA jurisdiction entirely. Sea Robin itself possesses precisely the same ability to spin down, at any time, its own gathering facilities, and thereby avoid coverage under the "in connection with" rate protection afforded by the NGA.

I. THE FERC'S NEW JURISDICTIONAL TEST CONFLICTS WITH THIS COURT'S INTERPRETATION OF NGA § 1(b).

The petitions in Nos. 02-1215 and 02-1265, to which we respectfully refer the Court, describe in detail why the decision below cannot be squared with this Court's interpretation of NGA § 1(b) in *Northern Natural*, which the Court of Appeals does not even cite. In the Court of Appeals' view, *ExxonMobil*'s construction of NGA § 1(b) supersedes *Northern Natural*'s.

We note in addition that, as was true for Vermilion Block 149 on the Sea Robin system, no real physical preparation of the gas for the first stages of distribution takes place at any of the FERC's chosen demarcation points along the Transco pipelines. The only relevant physical preparation of the gas in these cases occurs at the production platforms, downstream from the wellheads, where free water is separated from the gas and the gas is dehydrated in preparation for transport on Transco's former facilities. No further physical preparation takes place until the gas reaches shore. The FERC's chosen "central points of aggregation" are nothing more than forks in the road, far from where the gas is first physically prepared for distribution.

The Court of Appeals observes (App. at 3a, 16a) that the FERC *does* consider a number of "physical criteria" in applying its new test, but that is beside the point if the test does not ultimately define the boundary between gathering and transportation at or near a point where the gas is physically prepared for the first stages of distribution.

Furthermore, the Court of Appeals' willingness to accord *Chevron*[7] deference to FERC's "reasonable" application of its new test is incorrect in the light of *Neal v. United States*, 516 U.S. 284, 295 (1996). App. at 7a, 19a. As *Neal* makes clear, federal agencies and lower courts must honor this Court's settled interpretation of a federal statute.[8] Neither the FERC nor the Court of Appeals had discretion to ignore *Northern Natural*'s narrow interpretation of "gathering" in the NGA.

The Court of Appeals erred as well in suggesting (App. at 18a-19a) that Section 5 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334(f), provides an effective substitute for NGA rate protection. The OCSLA contains no provisions comparable to §§ 4 and 5 of the NGA, 15 USC §§ 717c, 717d, requiring OCS pipelines to charge only "just and reasonable" rates on file with and approved by the FERC, and thus the FERC has frequently recognized that the OCSLA does not provide rate protection equivalent to the NGA's.[9] Moreover, the protections afforded by OCSLA

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[7] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[8] *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000).

[9] *See, e.g., Transco (NPI/CT), order on reh'g*, 97 FERC at 62,382; *Transco (NHI/WC), order on reh'g*, 97 FERC at 62,409; *Transco (CL), order on reh'g*, 97 FERC at 62,396; *Trunkline Gas Co.*, 97 FERC

§ 5(f) were expressly intended by Congress *not* to "limit, abridge, or modify" any other provision of federal law with respect to pipelines on the OCS, including the NGA. 43 U.S.C. § 1334(f)(4).

II. THE *SEA ROBIN* RULE IS SUITABLE FOR REVIEW.

Sea Robin still owns the facilities designated by FERC as gathering upstream of Vermilion Block 149, and thus those facilities remain (for the time being) subject to FERC rate regulation under the "in connection with" clauses of NGA §§ 4 and 5. FERC and the other respondents in the *ExxonMobil* case contend, accordingly, that review of the *Sea Robin* orders in *ExxonMobil* would be premature.[10]

No such issue affects the instant case. By approving the transfer of the hundreds of miles of Transco facilities to Williams, FERC's orders below removed such pipelines from its authority under the NGA in an "in connection with" capacity or otherwise.[11] This was the circumstance we foresaw in *ExxonMobil* with respect to the exempt Sea Robin facilities: although subject to the FERC's "in connection

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¶ 61,169 at 61,799 (2001) ("*Trunkline*"); *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, Order No. 639-A, III FERC Stats. & Regs. ¶ 31,103 at 31,686 (2000), *vacated, Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal pending, The Williams Cos. v. FERC*, No. 02-5056 (D.C. Cir., filed Feb. 5, 2002) (recognizing that the OCSLA does not provide for rate regulation equivalent to that of the NGA).

[10] FERC Opp. at 9, 15-16, Sea Robin Opp. at ¶ 2, and Williams Opp. at 2, 7 in Nos. 02-1215 and 02-1265.

[11] *See, e.g., Conoco Inc. v. FERC*, 90 F.3d 536, 547 (D.C. Cir. 1996) (upholding FERC's conclusion that "it has no jurisdiction over an affiliate gatherer [which] operates independently of the interstate pipeline and performs only non-jurisdictional activities").

with" authority for the moment, they can be transferred at any time to a non-jurisdictional affiliate and thereby escape all FERC oversight under the NGA, as Transco has. Thus both *ExxonMobil* and this case are suitable for review.[12]

III. THE DECISION BELOW INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW WARRANTING REVIEW.

The FERC's *Sea Robin* and *Transco* orders give offshore pipeline owners every incentive to transfer the bulk of their facilities to non-jurisdictional gathering affiliates who can then charge captive shippers monopoly rents for movement of gas over formerly regulated lines.[13] This result is flatly contrary to *Northern Natural* and to the purpose of the NGA, which, in this Court's own words, is to afford consumers of interstate gas services "a complete, permanent, and effective bond of protection from excessive rates and charges."[14]

The FERC's license of OCS pipelines' exercise of market power can damage the interstate market by inviting reduced exploration and premature abandonment of existing captive production. Barring the intervention of this Court, NGA rate protection will no longer exist on major OCS pipelines,

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[12] Concurrently with the submission of this petition, we have asked by letter to the Clerk that the Court consider this case and the petitions in Nos. 02-1215 and 02-1265 in tandem at the same conference.

[13] Transco is not the only OCS pipeline that, relying on the *Sea Robin* orders, has sought to spin down and reclassify formerly regulated facilities. *See Trunkline*, *supra* note 9; *Enron Gulf Coast Gathering, L.P.*, 97 FERC ¶ 61,001 (2001); *Dauphin Island Gathering Sys.*, 93 FERC ¶ 61,198 (2000).

[14] *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 364 U.S. 137, 147 (1960); *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388 (1959).

jeopardizing in these times of national gas shortage[15] Congress' intent "to assure an adequate and reliable supply of gas [to the interstate market] at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 25, 2003

[15] *See Natural Gas Supply and Demand Issues: Hearing Before the House Comm. On Energy and Commerce*, 108th Cong. (June 10, 2003) (statement of Alan Greenspan, Chairman, Federal Reserve Board); *Natural Gas Supply: Hearing Before the Sen. Comm. on Energy and Natural Resources*, 108th Cong. (July 10, 2003) (statement of Alan Greenspan, Chairman, Federal Reserve Board).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1327

WILLIAMS GAS PROCESSING—GULF COAST COMPANY, L.P.
AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

DYNEGY MARKETING AND TRADE, ET AL.,
Intervenors.

Argued May 12, 2003
Decided June 20, 2003

Before: GINSBURG, Chief Judge, and ROGERS and TATEL, Circuit Judges.

ROGERS, Circuit Judge:

Transcontinental Gas Pipe Line Corp. ("Transco") petitioned the Federal Energy Regulatory Commission ("FERC") for approval to transfer some of its pipeline facilities to its affiliate, Williams Gas Processing—Gulf Coast Co. ("WGP"), and to certify that the facilities serve gathering rather than transmission functions. FERC approved the applications in part and denied them in part, and Transco and WGP now challenge the portions of the orders that denied the requests, contending that FERC's assertion of jurisdiction is

contrary to precedent regarding the exemption of gathering facilities under the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b) (2000). A coalition of natural gas producers ("the Producers") also petitions the court for review, objecting to those portions of FERC's orders that granted the abandonment and reclassification of facilities as gathering for lack of a reasoned determination and as contrary to the public interest. Our review of these petitions is instructed by *ExxonMobil Gas Marketing Co. v. FERC,* 297 F.3d 1071, 1084 (D.C. Cir. 2002), where the court stated that it will defer to FERC's reasonable determinations regarding gathering status under NGA section 1(b), 15 U.S.C. § 717(b). We hold that petitioners fail to demonstrate that FERC's choices are "unreasonable and its chosen lines of demarcation [are] not within a 'zone of reasonableness' as distinct from the question of whether the lines [are] 'precisely right.'" *ExxonMobil,* 297 F.3d at 1084; *see Conoco Inc. v. FERC*, 90 F.3d 536, 544 (D.C. Cir. 1996). Accordingly, we deny the petitions inasmuch as FERC considered the appropriate factors under the primary function test and sufficiently explained its reasoning.

I.

Section 1(b) of the NGA distinguishes between facilities that are used for "the transportation of natural gas in interstate commerce," which are subject to FERC's jurisdiction, and those used for "gathering," which are not. 15 U.S.C. § 717(b). "Gathering" is generally defined as "the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system." *Conoco,* 90 F.3d at 539 n.2 (citing *Northwest Pipeline Corp. v. FERC,* 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)). Although "the line between jurisdictional transportation and nonjurisdictional gathering is not always clear," *Conoco,* 90 F.3d at 542, it is central to this case.

Since 1983, FERC has used a multi-factor "primary function test" to determine "whether a facility is devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has been collected—interstate transportation." *Conoco,* 90 F.3d at 543 (citing *Farmland Indus., Inc.,* 23 F.E.R.C. ¶ 61,063, at 61,143 (1983); *Amerada Hess Corp.,* 52 F.E.R.C. ¶ 61,268, at 61,987-88 (1990)). Under the primary function test, FERC considers six physical criteria: (1) the pipelines' length and diameter; (2) the central point in the field; (3) the facility's geographic configuration or pattern; (4) the location of compressors and processing plants, particularly where the pipelines are located behind the plant; (5) the location of wells along all or part of the facilities; and (6) the line's operating pressure. *ExxonMobil,* 297 F.3d at 1077 (citing *Lomak Petroleum, Inc. v. FERC,* 206 F.3d 1193, 1196 (D.C. Cir. 2000)). FERC also accounts for certain nonphysical factors, including: (1) the facility's purpose, location, and operation; (2) the pipeline owner's general business activity; (3) the objectives of the NGA and other pertinent legislation; and (4) the changing technical and geographic nature of exploration and production activities. *ExxonMobil,* 297 F.3d at 1077. No single criterion is dispositive, and not all of the factors apply in all situations. *Id.* (citing *Williams Field Servs. Group, Inc. v. FERC,* 194 F.3d 110, 116 (D.C. Cir. 1999); *Conoco*, 90 F.3d at 543).

FERC initially developed the primary function test for classifying onshore facilities, and it later modified the test in considering the increasing number of pipelines that were being constructed offshore on the Gulf of Mexico's Outer Continental Shelf ("OCS"), where gathering and distribution patterns are somewhat different. *ExxonMobil,* 297 F.3d at 1077 (citing *EP Operating Co. v. FERC,* 876 F.2d 46 (5th Cir. 1989)). Because offshore pipelines often must transport raw gas over longer distances, FERC adopted a "sliding scale" approach that permitted gathering pipelines of greater

length and diameter in correlation with distance from shore and water depth. *ExxonMobil,* 297 F.3d at 1078 (citing *Amerada Hess,* 52 F.E.R.C. ¶ 61,268, at 61,988). When FERC applied this modified approach in determining that the Sea Robin Pipeline Company's pipelines were jurisdictional transmission facilities, the Fifth Circuit reversed, questioning FERC's heavy emphasis on the facilities' size and on nonphysical factors and inviting FERC to reformulate its primary function test in light of the "physical, geographical and operational characteristics of pipelines in the OCS." *Sea Robin Pipeline Co. v. FERC,* 127 F.3d 365, 369-71 (5th Cir. 1997). On remand, FERC determined that the "behind-the-plant" test is not determinative of the gathering question offshore, and that instead it would look at the offshore system's configuration to locate a central point where gas is aggregated for transportation onshore. *Sea Robin Pipeline Co.,* 87 F.E.R.C. ¶ 61,384, at 62,425 (1999) (*Sea Robin II*). FERC explained that this central aggregation point is analogous to the "central-point in-the-field" criterion for onshore systems and should be "given weight in identifying the demarcation point between gathering and transportation on OCS pipeline systems." *Id.* at 62,426. FERC also emphasized that it would focus primarily on physical factors, according only secondary importance to nonphysical factors. *Sea Robin Pipeline Co.,* 92 F.E.R.C. ¶ 61,072, at 61,284 (2000). This court subsequently held that FERC reasonably applied its reformulated primary function test to the Sea Robin system. *ExxonMobil,* 297 F.3d at 1087.

It was against the backdrop of the evolving primary function test and the distinction between jurisdictional transmission and exempt gathering facilities that Transco and WGP filed the applications at issue. In the parlance of the oil and gas industry, a "spindown" occurs when a natural gas transporter transfers operation of its facilities to a gathering affiliate. *See Conoco,* 90 F.3d at 541. In 1996, Transco sought FERC's authorization, pursuant to NGA section 7(b), 15

U.S.C. § 717f(b), to spin down a number of its facilities to WGP as part of a comprehensive corporate restructuring plan. Transco's application covered a large number of its facilities on seven different pipeline systems in Texas and Louisiana and offshore on the OCS. On the same day, WGP petitioned FERC for an order declaring that the facilities it intended to acquire from Transco—most of which FERC had previously certificated as transmission facilities under section 7(c) of the NGA—were gathering facilities exempt from its jurisdiction under section 1(b).

FERC dismissed the comprehensive application without prejudice. *Transcon. Gas Pipeline Corp.*, 76 F.E.R.C. ¶ 61,317, at 62,543 (1996) ("*Comprehensive Order*"). FERC observed that "the physical parameters of the subject facilities are massive and complex, involving over 3,100 miles of pipeline," and that the number of facilities included in Transco's application "is without precedent in prior 'spin-down' cases." *Id.* (footnote omitted). Explaining that important differences existed among the many pipelines that Transco included in its application, and that, "at the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities," *id.* at 62,543, FERC also noted that "a decision to grant the requested abandonment in this case could set a precedent for ending NGA jurisdiction on the OCS, as it is likely that virtually every similar interstate pipeline on the OCS then would file a similar application." *Id.* at 62,542. Because "neither Transco nor WGP included in [its] pleadings an alternative request that [FERC] find specific parts of the facilities to be . . . nonjurisdictional," FERC dismissed the comprehensive application while stating that Transco and WGP could still file "another proposal requesting that [FERC] consider discrete portions of the facilities . . . to be gathering." *Id.* at 62,543. FERC denied the request for rehearing, noting that "the parties [did] not seek to parse the Transco facilities; rather, they continued to insist that [FERC] should find all the facilities at issue to be

gathering." *Transcon. Gas Pipe Line Corp.*, 95 F.E.R.C. ¶ 61,396, at 62,475-76 & n.3 (2001) ("*Comprehensive Rehearing Order*").

Transco and WGP then filed three sub-spindown applications seeking permission to abandon and to reclassify discrete portions of the Transco systems. FERC approved the spindown of the North Padre Island and Central Texas Systems. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,115, at 61,429 (2001) ("*North Padre/Central Texas Order*"). Relying on the reformulated primary function test set forth in *Sea Robin II*, 87 F.E.R.C. ¶ 61,384 (1999), FERC determined that each system featured a central aggregation point demarcating gathering and transmission functions. *North Padre/Central Texas Order*, 96 F.E.R.C. at 61,440-41 (2001). FERC applied similar reasoning in approving Transco's abandonment of portions of the North High Island and West Cameron systems, again pinpointing central aggregation points and identifying some, but not all, of the pipelines as serving gathering functions. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,118, at 61,449, 61,458-60 (2001) ("*North High Island/West Cameron Order*"). Finally, FERC approved Transco's requested abandonment of the Central Louisiana facilities and, upon locating a central aggregation point at Vermilion Block 67, designated part of the system as gathering. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,246, at 61,966 (2001) ("*Central Louisiana Order*"). Transco and WGP sought rehearing of those portions of the orders that designated parts of the systems as transmission facilities, and the Producers sought rehearing of the gathering determinations. FERC denied the rehearing requests. *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,296 (2001), *order on reh'g, North Padre/Central Texas Order; Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,298 (2001), *order on reh'g, Central Louisiana Order; Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,300 (2001), *order on reh'g, North High Island/West Cameron Order*.

II.

Transco and WGP contend that FERC erred in rejecting their initial comprehensive application and improperly determined in the sub-spin down proposals that portions of the facilities were transmission rather than gathering. In considering these objections, the court will sustain FERC's factual findings if they are supported by "substantial evidence," 15 U.S.C. § 717r(b); *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC,* 958 F.2d 1101, 1115 (D.C. Cir. 1992) (per curiam), and will set aside FERC's actions if they are arbitrary and capricious, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). The court also applies *Chevron*'s familiar two-step framework to FERC's interpretation of section 1(b) of the NGA. *Exxon-Mobil,* 297 F.3d 1071 at 1083 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). Moreover, the court is mindful that in "evaluating and balancing the several factors under the primary function test, [FERC] brings to bear its considerable expertise about the natural gas industry." *Conoco,* 90 F.3d at 544 (citations omitted). Consequently, "the burden is on the petitioners to show that [FERC's] choices are unreasonable and its chosen line of demarcation is not within a 'zone of reasonableness' as distinct from the question of whether the line drawn by [FERC] is 'precisely right.'" *ExxonMobil,* 297 F.3d at 1084 (citations omitted).

A.

According to Transco and WGP, FERC misconstrued the comprehensive application as an "all or nothing" request—in other words, FERC misunderstood Transco and WGP as requesting that FERC allow them to abandon and reclassify all of their facilities or none at all. Transco and WGP maintain that their filings contained no such "all-or-nothing" contingency. Because Transco and WGP failed to object to FERC's all-or-nothing characterization in seeking rehearing,

they are precluded from raising this argument here. Section 19(b) of the NGA, 15 U.S.C. § 717r(b), bars the court from considering on review any objection that was not raised on rehearing, without good cause shown. *Fed. Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99 (1955); *ASARCO v. FERC*, 777 F.2d 764, 774-75 (D.C. Cir. 1985). Transco and WGP sought rehearing, challenging FERC's denial of the comprehensive application on a number of grounds, but, despite FERC's invitation to clarify that they were making an alternative request that FERC find that some parts of the facilities perform a gathering function, Transco and WGP nowhere requested that FERC sever the comprehensive application. Having filed a rehearing request that implicitly accepted the *Comprehensive Order*'s all-or nothing understanding, and not having shown good cause for failing to raise their severance argument before the agency, Transco and WGP are barred from challenging that understanding before the court. *See ASARCO*, 777 F.2d at 775.

FERC therefore was forced either to declare that all of the facilities at issue performed a gathering function or to deny the comprehensive application altogether. In this posture, jurisdiction and merits overlap, for the court must consider the merits of FERC's decision that at least one of the facilities performed a transmission function, thereby precluding approval of the all-or-nothing petition. FERC's decision in the *Comprehensive Order* was driven by the primary function analysis: FERC considered the relevant factors—including pipeline size and length, volume of gas, and water depth—and relied on no irrelevant factors. *Comprehensive Order*, 76 F.E.R.C. at 62,542-43 & nn.9-12. Transco and WGP contend that FERC was preoccupied with size, without regard to the "sliding scale" analysis required by *EP Operating*, 876 F.2d at 48-49. On the contrary, FERC's orders demonstrate that FERC was concerned with the transmission function of the pipelines located closest to shore, in the shallowest waters, *id.* at 62,543—precisely the type of analysis contemplated by the

sliding scale approach, *Exxon-Mobil,* 297 F.3d 1071 at 1078 (citing *Amerada Hess,* 52 F.E.R.C. at 61,988). Specifically, FERC found that Transco and WGP had "not adequately explained how . . . existing interstate pipeline facilities that are not located in deep OCS waters, i.e., waters in excess of 200 meters, can properly be reclassified as gathering lines under the 'primary function' test." *Comprehensive Order*, 76 F.E.R.C. at 62,543. In light of this analysis, it was reasonable for FERC to conclude that, "at the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities." *Id.*

B.

Regarding two of the three sub-spindown proposals, Transco and WGP contend that FERC erred by failing to recognize the physical realities of gathering exhibited by all of the pipelines addressed in the *Central Louisiana Order* and the *North High Island/West Cameron Order*, and thus failed properly to apply the modified primary function test for offshore gathering systems. *See EP Operating Co.,* 876 F.2d at 48-49; *Amerada Hess,* 52 F.E.R.C. ¶ 61,268 (1990).

Transco and WGP contend that the *Central Louisiana Order* was in error for two primary reasons. First, they claim that FERC neglected to apply *Amerada Hess*'s sliding scale approach, which was designed to "allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area." *Amerada Hess,* 52 F.E.R.C. at 61,988. Transco and WGP maintain that FERC failed to recognize that the Central Louisiana system's spine-and-lateral configuration is characteristic of a gathering function, regardless of whether the system is on- or offshore, and that the offshore pipelines are longer and larger only because of the distances involved, not because their function is different. Second, Transco and WGP contend that in concluding that Vermilion Block 67 marks the central aggregation point at

which the offshore lines convert from gathering to transmission, FERC ignored the fact that the offshore pipelines are part of the spine-and-lateral gathering system, and that the Cow Island Junction is the proper point of central aggregation.

Because "it is for [FERC], in the first instance, to determine the patterns of gathering and transportation in the offshore context," the court is "generally 'unwilling to review line-drawing performed by [FERC] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" *ExxonMobil,* 297 F.3d at 1085 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)). The *Central Louisiana Order* makes clear that FERC properly considered the facilities' diameter (sixteen and twenty inches), length (forty-two miles), and the source of the pipelines' pressure (from the wellhead), as well as the absence of processing plants (which, FERC explained, means little offshore). 96 F.E.R.C. at 61,976. Transco and WGP have not carried their burden of showing that FERC's determination falls outside of a "zone of reasonableness." *ExxonMobil,* 297 F.3d at 1084. The court in *ExxonMobil* affirmed FERC's use of the central-aggregation-point test for offshore systems, *id.* at 1087, and a map of the Central Louisiana system shows that FERC reasonably concluded that the entire system features two aggregation points—one at Vermilion Block 67 and the other at Cow Island Junction. Given the system's configuration—a spine-and-lateral system in which many smaller pipelines branch off of a central "spine"—it was permissible for the Commission to find that some of the pipelines assume a transmission function when they converge at Vermilion Block 67, while others serve a gathering purpose until they reach Cow Island. 96 F.E.R.C. at 61,977. "Reasonable people may disagree as to where gathering ends and transportation begins," and this court will not substitute its judgment for a FERC determination that is not "patently unreasonable."

ExxonMobil, 297 F.3d at 1085; *see also Conoco,* 90 F.3d at 544.

The same deference principles apply to FERC's findings in the *North High Island/West Cameron Order.* This system is shaped like an inverted "Y" with two "legs"—the North High Island pipelines to the west and the West Cameron pipelines to the east—that converge onshore at the Station 44/Cameron Meadows complex. FERC determined that only a portion of the North High Island subsystem is nonjurisdictional, locating a central aggregation point at Block 10, *North High Island/West Cameron Order,* 96 F.E.R.C. ¶ 61,118, at 61,458-59, and that the entirety of the West Cameron subsystem serves a transmission function, *id.* at 61,459. Transco and WGP contend that FERC erred by evaluating the east and west legs independently rather than treating the Station 44/Cameron Meadows complex as the central aggregation point. According to Transco and WGP, the entire system, like the Sea Robin system, must be evaluated as a whole, and FERC cannot view each leg of the "Y" independently. But FERC explained that the two subsystems "generally operate independently, with the North High Island facilities collecting gas from the west in Offshore Texas and the West Cameron facilities collecting gas from the east in Offshore Louisiana." *Id.* at 61,458. Then, in assessing each subsystem, FERC noted the differences between the two. FERC reasonably concluded, in light of these differences, that the subsystems serve transmission functions before converging at the Station 44/Cameron Meadows complex. As in *ExxonMobil,* it was permissible for FERC to conclude "that different parts of the system required different jurisdictional treatment." *ExxonMobil,* 297 F.3d at 1085.

Transco and WGP next contend that FERC improperly designated a central aggregation point on the North High Island facility rather than finding the whole facility to be gathering. FERC explained that "the North High Island sub-

system consists of approximately 174 miles of 4 to 30-inch pipeline," most of which is "relatively small, with the lines ranging from 4 to 24-inches in diameter." *North High Island/ West Cameron Order,* 96 F.E.R.C. at 61,458. "The longest segment is a 63 mile, 24-inch Line C that connects all the upstream facilities with the plant complex onshore." *Id.* FERC concluded that "although the North High Island Block 10 point does not exhibit as strong an indication of a marked physical change in facilities as was the case in *Sea Robin*," the interconnection of the 24-inch Line C with a 12-mile, 16-inch line at Block 10 nonetheless "serves as the central point of aggregation for the subsystem, where all the gas gathered upstream is delivered to a single point for transportation onshore." *Id.* at 61,458-59. In reaching this conclusion, FERC considered the length and diameter of the pipeline, the volume of gas transmitted, the shape of the subsystem, and the gas pressure. *Id.* at 61,459. Given that FERC considered the pertinent factors, its conclusion was not arbitrary and capricious. *See Conoco,* 90 F.3d at 544.

Transco and WGP further contend that FERC erred in concluding that all of the West Cameron facility is transmission. In assessing the West Cameron facility, FERC considered the length, diameter, and pressure of the pipeline on the West Cameron subsystem; the location of wells and lack of processing plants along the line; and the shape of the long, continuous pipeline connecting production in the OCS to the onshore processing facilities. *North High Island/West Cameron Order,* 96 F.E.R.C. at 61,459-60. Based on these factors, FERC found "that the West Cameron subsystem's primary function is that of a transmission facility, not a gathering one." *Id.* at 61,460. This conclusion was not arbitrary and capricious.

Transco and WGP contend, finally, that FERC failed to comply with its own precedent when it ignored the historical evolution of the Central Louisiana and North High Island/

West Cameron systems in determining their primary function. In *Enron Gulf Coast Gathering L.P.*, 95 F.E.R.C. ¶ 61,318 (2001), FERC stated that the fact that the pipelines in question "were built in separate stages over a number of years after" the original system's construction "in order to access new gas supplies on the OCS also speaks to their primary gathering function." *Id.* at 62,097 (footnote omitted). Transco and WGP contend that, consistent with that precedent, they presented FERC with detailed evidence showing that the systems' history and evolution suggest a primary gathering function. But FERC did not err in according little weight to this factor. Although FERC recognized in *Enron* that the historical evolution of the pipeline system may be relevant, it has not traditionally been a criterion in the primary function test. *See ExxonMobil,* 297 F.3d at 1077. Moreover, as FERC notes, the Fifth Circuit instructed FERC to afford nonphysical factors, such as a system's historical evolution, only secondary importance. *Sea Robin,* 127 F.3d at 371. In any event, this court has observed that "the historical classification" of a system is "of limited utility" in "'the wake of major regulatory changes in the natural gas industry'" effected by Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, F.E.R.C. Stats. & Regs. ¶ 30,939, *reh'g granted in part*, Order No. 636-A, F.E.R.C. Stats. & Regs. ¶ 30,950, *reh'g denied*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *aff'd in part, rev'd in part sub nom. United Distrib. Cos. v. FERC,* 88 F.3d 1105 (1996) (per curiam) ("*Order No. 636*"). *ExxonMobil,* 297 F.3d at 1086-87 (quoting *Conoco,* 90 F.3d at 539). For reasons we explain in Part III, this analysis applies to Transco's facilities. Thus, FERC did not err in declining to classify the lines as gathering on the basis of their historical evolution.

III.

The Producers challenge approval of the abandonment and reclassification of Transco's facilities on the grounds that FERC: (1) failed to find that a change in circumstances justified revisiting an earlier classification of Transco's facilities as gathering; (2) misapplied the reformulated primary function test; and (3) neglected to conduct a sufficient public interest analysis. Each of these contentions lacks merit.

FERC has stated that "existing interstate pipelines and gathering facilities [will] retain their status barring some change in circumstances . . . ." *Gas Pipeline Facilities and Services on the Outer Continental Shelf,* 74 F.E.R.C. ¶ 61,222, at 61,757 (1996) ("*OCS Policy Statement*"). According to the Producers, Transco requested in 1990 that FERC certificate its facilities as transmission when Transco was restructuring from a merchant to a transporter. Because FERC granted Transco's request, the Producers maintain, the *OCS Policy Statement* required FERC to find that a change in circumstances justified revisiting the certification decision.

FERC explained in the orders on review that *Order No. 636*, which promoted the unbundling of pipeline services, effected significant changes in the industry, and that those changes justified Transco's abandonment request. *E.g., North Padre/Central Texas Order,* 96 F.E.R.C. ¶ 61,118, at 61,434. FERC noted that Transco had sought to certificate its pipelines as transmission at a time when "Transco did not have a need to precisely distinguish between jurisdictional transmission and exempt gathering facilities," because those services could be bundled. *Id.* at 61,431. But "Transco, like many interstate pipelines, found after restructuring its system consistent with Order No. 636, and moving from a bundled, merchant function to an unbundled, transportation function, that it no longer needed all of its existing system facilities." *Id.* at 61,434. FERC accordingly found that Transco's re-

quested spindown was reasonable "because [its] facilities are no longer necessary for the service it currently provides." *Id.*

FERC's explanation is consistent with the major industry changes wrought by *Order No. 636*. In *ExxonMobil*, for instance, the petitioners complained that FERC failed "to give weight to the previously 'settled status' of the classification of [the facilities in question] as engaged in jurisdictional transportation." *ExxonMobil,* 297 F.3d at 1086. But the court observed that "when interstate gas pipelines served the multi-function role of purchasing, gathering, transporting, and re-selling natural gas, *i.e.* bundled sales, the transportation/gathering jurisdictional question may have been of less consequence." *Id.* (citation omitted). The court then explained that FERC "has been struggling with the reclassification of facilities in the wake of the unbundling of gas sales and interstate transportation in Order No. 636." *Id.* at 1087 (citing *Conoco,* 90 F.3d at 539-41). Because *Order No. 636* took effect after Transco's certification, the changes effected by the Order then were sufficiently significant to justify FERC's revisiting of Transco's classifications. The Producers object that if this rationale is accepted, then all prior determinations of transmission/gathering status could potentially be reopened, thereby upsetting producers' reliance and repose interests. Even so, the objection confirms the understanding that *Order No. 636* worked a substantial change in the industry; it does not provide a reason for declining to revisit Transco's certification.

Furthermore, in light of the court's upholding in *ExxonMobil,* 297 F.3d at 1087, of FERC's modified primary function test as reasonable, the Producers' contention that FERC's orders are founded on a flawed reformulation of the primary function test necessarily fails. Similarly, the Producers' contention that FERC misapplied the primary function test by according determinative weight to the central-aggregation point factor also fails. Although FERC

maintains that the Producers waived this challenge by failing to raise it on rehearing, *see* 15 U.S.C. § 717r(b); *Colorado Interstate Gas,* 348 U.S. at 497-99; *ASARCO,* 777 F.2d at 774-75, their argument before FERC that it erred in selecting the specific points along Transco's system where gathering ends and transmission began was sufficient to preserve the objection. While the Producers maintain that FERC erred in finding that virtually all facilities located upstream from the central aggregation point are gathering and in failing to reconcile its conclusions with prior precedents, the orders demonstrate that FERC adequately considered a range of relevant factors—the facilities' length and diameter, the volume of gas transmitted, the pipelines' configuration, the location of compression facilities and processing plants, the source of pressure, and the presence of a central aggregation point. *North Padre/Central Texas Order,* 96 F.E.R.C. ¶ 61,118, at 61,440-42; *North High Island/West Cameron Order,* 96 F.E.R.C. ¶ 61,118, at 61,458-60; *Central Louisiana Order,* 96 F.E.R.C. ¶ 61,246, at 61,976-77. FERC did "not consider any one factor to be determinative," *North Padre/Central Texas Order,* 96 F.E.R.C. ¶ 61,118, at 61,442, and its determinations were consistent with prior precedent. Although the Producers contend that FERC's decisions in *Seahawk Shoreline System,* 93 F.E.R.C. ¶ 61,097 (2000), *reh'g denied, Seahawk Transmission Co.,* 95 F.E.R.C. ¶ 61,342 (2001), and *Venice Gathering Co.,* 97 F.E.R.C. ¶ 61,045 (2001), are dispositive because the size of those pipelines was the same as the size of Transco's facilities, other relevant differences remain, including the systems' proximity to shore and their connections to other lines. Hence, "it is entirely appropriate for FERC to proceed on a case-by-case basis . . . ." *ExxonMobil,* 297 F.3d at 1087 (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947)). FERC gave reasoned consideration to each of the pertinent factors, and its factual conclusions are supported by

substantial evidence in the record. *ExxonMobil,* 297 F.3d at 1084 (citations and quotations omitted).

Producers finally contend that even if the facilities are properly classified as gathering, the NGA required FERC to make a public interest finding before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate. *See* 15 U.S.C. § 717f(b); *Transcon. Gas Pipe Line Corp. v. Fed. Power Comm'n,* 488 F.2d 1325, 1328 (D.C. Cir. 1973) (per curiam); *Michigan Consol. Gas Co. v. Fed. Power Comm'n,* 283 F.2d 204, 214 (D.C. Cir. 1960). The Producers explain that the facilities in question were certificated as transmission, and the abandonment of certificated facilities is subject to FERC's public interest standard. In a public interest analysis, "the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interest 'will in no way be disserved' by abandonment." *Transcon. Gas,* 488 F.2d at 1328 (quoting *Michigan Consol.,* 283 F.2d at 214). The Producers contend that FERC failed adequately to consider the anti-competitive effects of Transco's abandonment.

In FERC's view, "the issue of competition" is not "relevant to whether or not [FERC] will regulate an affiliated gatherer's rates or terms and conditions of service after it acquires abandoned facilities," because FERC "has no authority under the NGA to regulate a gatherer's rates or its terms and conditions of service." *North High Island/West Cameron Order,* 96 F.E.R.C. ¶ 61,118, at 61,454 (citing *Conoco,* 90 F.3d 536). Put more simply, "NGA § 7(b) does not require [FERC] authorization for a transfer of gathering facilities." Respondent's Br. at 50. As the court has explained, "section 7(b) only applies to jurisdictional facilities, and 'does not expand [FERC's] § 1(b) jurisdiction.'" *ExxonMobil,* 297 F.3d at 1088 (quoting *Conoco,* 90 F.3d at 553); accordingly, the petitioner in *ExxonMobil* could not use section 7(b) to "bootstrap" FERC jurisdiction over a set of gathering

facilities that the petitioner sought to reclassify (but not to abandon). *Id.* Although the situation here is slightly different than in *ExxonMobil*, because Transco wishes to abandon its pipelines rather than simply reclassify them, FERC properly determined that under NGA section 7(b) it had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering. *See, e.g., North Padre/Central Texas Order*, 96 F.E.R.C. ¶ 61,118, at 61,435. We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC,* 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

As to shippers' anti-competition concerns, FERC explained that even though it lacked the authority to deny the abandonment, the concerns were unfounded because the abandonment was "consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." *North High Island/West Cameron Order,* 96 F.E.R.C. ¶ 61,118, at 61,454 (citing *Northern Natural Gas Co.,* 93 F.E.R.C. ¶ 61,101, at 61,273 (2000)). FERC further noted that "the facilities at issue here are located on the OCS and will become subject to the [Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-56 (2000),] upon approval of the spindown," thereby limiting any potential anticompetitive effects. *North Padre/Central Texas Order,* 96 F.E.R.C. ¶ 61,118, at 61,435. Under FERC's OCSLA regulations, WGP is required to report the terms under which it provides service to shippers; a shipper can file a complaint if it believes either Transco or WGP has violated its statutory obligations and "the Commission will investigate any such complaint in a timely manner." *Id.* (citing 18 C.F.R. § 343.2, 385.206 (2000)). Thus, FERC has taken the long

view, concluding that *Order No. 636*'s unbundling policies create competitive conditions and that, combined with the standards of conduct for gathering facilities in Transco's tariff, the OCSLA sufficiently guards against the exercise of monopoly power. *See United Distrib. Cos.*, 88 F.3d at 1139.

Accordingly, because the court is "'generally unwilling to review line-drawing performed by [FERC] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem,'" *ExxonMobil,* 297 F.3d at 1085 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)), and FERC's conclusions were reasonable, we deny the petitions for review.

Supreme Court, U.S.
FILED
DEC 1 - 2003
OFFICE OF THE CLERK

Nos. 03-147 and 03-431

In the Supreme Court of the United States

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

SHELL OFFSHORE INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) reasonably concluded that portions of Transco's pipeline system located on the Outer Continental Shelf involve the gathering of natural gas within the meaning of Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b).

2. Whether FERC was required to treat the reclassification of portions of Transco's system as nonjurisdictional as abandonment of jurisdictional facilities under Section 7(b) of the NGA, 15 U.S.C. 717f(b), and therefore to determine whether the action would further the public interest.

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In the Supreme Court of the United States

No. 03-147

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 331 F.3d 1011. The orders of the Federal Energy Regulatory Commission are reported at 96

[1] References to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 03-431.

F.E.R.C. ¶ 61,118 (Pet. App. 60a-97a), 97 F.E.R.C. ¶ 61,300 (Pet. App. 98a-126a), 96 F.E.R.C. ¶ 61,115 (Pet. App. 127a-167a), 97 F.E.R.C. ¶ 61,296 (Pet. App. 168a-197a), 96 F.E.R.C. ¶ 61,246 (Pet. App. 198a-234a), and 97 F.E.R.C. ¶ 61,298 (Pet. App. 235a-263a).

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2003. A petition for rehearing was denied on August 22, 2003. The petition for a writ of certiorari in No. 03-147 was filed on July 25, 2003, and in No. 03-431 on September 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, confers on the Federal Energy Regulatory Commission (FERC) jurisdiction to regulate certain aspects of the natural gas industry. The provisions of the NGA apply to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to," *inter alia*, "the production or gathering of natural gas." 15 U.S.C. 717(b).

The NGA gives FERC the authority to ensure that rates and charges for sales and transportation subject to its jurisdiction are "just and reasonable," and to declare as unlawful any "unjust, unreasonable, unduly discriminatory, or preferential" rate or charge for or "in connection with" any "transportation or sale of natural gas" subject to its jurisdiction. 15 U.S.C. 717c(a), 717d(a). The Act also requires that any natural gas company obtain a "certificate of public convenience and necessity" before constructing or operating new facili-

ties, 15 U.S.C. 717f(c), and further bars any natural gas company from "abandon[ing] all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that the present or future public convenience or necessity permit such abandonment," 15 U.S.C. 717f(b).

2. This case involves FERC's reclassification of portions of a pipeline's system operating on the Outer Continental Shelf (OCS) as non-jurisdictional gathering facilities within the meaning of 15 U.S.C. 717(b) and FERC's determination that 15 U.S.C. 717f(b) did not preclude the pipeline from transferring those facilities to its non-jurisdictional gathering affiliate.

Although the NGA does not define the term "gathering," this Court has stated that the terms "production and gathering" under the NGA are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963). Consistent with that principle, FERC has long defined the term gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957).

To differentiate jurisdictional transportation and non-jurisdictional gathering for pipelines, FERC for many years has employed two principal tests. Under the "behind-the-plant" test, facilities upstream of compressors and processing plants (*i.e.*, toward the wellhead where the gas comes out of the ground) were presumptively gathering facilities, while facilities downstream of the plants (*i.e.*, toward the consumer) were presumptively transportation facilities. For gas that

requires no processing, FERC has also employed a "central-point-in-the–field" test, under which lateral lines that collect and transport gas from separate wells and that then converge into a single large line were classified as gathering facilities, while facilities downstream of the collection point in a field were classified as transportation. Since 1983, FERC has subsumed those two tests into a "primary function" test that focuses on a number of physical factors (*e.g.*, length, diameter, and configuration of a pipeline) and certain other criteria, to determine whether facilities are primarily devoted to gathering or transportation. Under that test, no one factor is determinative, nor do all factors apply in every situation. Pet. App. 3a-4a; *ExxonMobil Gas Mktg. Co.* v. *FERC*, 297 F.3d 1071, 1077 (D.C. Cir. 2002), cert. denied, 124 S. Ct. 48 (2003); *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 368-369 (5th Cir. 1997).

FERC developed its primary function test in the context of onshore gathering patterns. For natural gas produced on the Outer Continental Shelf (OCS), pipelines generally are configured differently. "[P]ipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation." *ExxonMobil Gas Mktg. Co.*, 297 F.3d at 1077. "Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where 'only the most rudimentary separation and dehydration operations' are conducted, to the shore or a point closer to shore, where it can be processed into 'pipeline quality' gas." *Id.* at 1077-1078 (quoting *EP Operating Co.* v. *FERC*, 876 F.2d 46, 47-48 (5th Cir. 1989)); accord *Sea Robin Pipeline*, 127 F.3d at 369-370 (noting that pipelines on the OCS "must construct large pipes to carry (often

over a hundred miles away) the raw gas from offshore rigs to the shore for processing"). In response to the practical and physical differences between onshore and offshore pipeline configurations, FERC modified its primary function test for the OCS to allow for the increasing length and diameter of OCS gathering lines, *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990), and later announced that it would "presume facilities located in deep water [over 200 feet] are primarily engaged in gathering or production." *Gas Pipeline Facilities & Servs. on the Outer Continental Shelf—Issues Related to the Comm'n's Jurisdiction Under the Natural Gas Act and Outer Continental Shelf Lands Act*, 74 F.E.R.C. ¶ 61,222, at 61,759 (1996).

As a result of FERC's decision in Order 636[2] to promote competition by requiring pipelines to "unbundle" their previously bundled sales and transportation into separate services and to transport natural gas for all qualified shippers, *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1125-1127 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997), some such pipelines have sought to shed OCS facilities that primarily perform a gathering function. Accordingly, those pipelines have asked FERC to reclassify OCS facilities that were previously classified as transportation, and to authorize "spin-downs" of OCS gathering facilities to affiliates.

Even when granting such requests, FERC retains NGA rate jurisdiction over those reclassified facilities

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[2] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 3 F.E.R.C. Stats. & Regs. (CCH) ¶ 30,939 (Apr. 8, 1992).

that the pipeline retains. FERC "may regulate rates charged for transportation on the pipeline's own gathering facilities performed in connection with jurisdictional transportation." *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1263 (8th Cir.) (emphasis omitted), cert. denied, 502 U.S. 856 (1991). Moreover, in spin-down situations, where the pipeline and its nonjurisdictional gathering affiliate act in concert to frustrate FERC's rate regulation, FERC has disregarded corporate forms, treated the two affiliates as a single entity, and regulated the rates for gathering as rates charged "in connection with" the pipeline's transportation rates. *Shell Offshore Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 F.E.R.C. ¶ 61,254 (2002), appeal pending *sub nom. Williams Gas Processing–Gulf Coast Co.* v. *F.E.R.C.*, No. 03-1179 (D.C. Cir. docketed June 27, 2003).

3. The instant case involves the reclassification to gathering and request to spin-down all or parts of four OCS subsystems originally owned and operated by Transcontinental Gas Pipe Line Corporation (Transco) as jurisdictional transportation facilities. Three of those subsystems, North Padre Island, Central Texas and North High Island, which range in length from 23 to 270 miles of pipeline (Pet. App. 87a, 133a-134a), are each configured roughly in the form of a "Y," with legs that converge from OCS production areas into a central point of interconnection with a trunk or trunks that run to shore. *Id.* at 87a-88a, 158a-160a.[3] Facilities located on the legs collect gas from wells located along their length and deliver it to the central point. *Id.* at 87a-88a, 157a-160a. From there, trunklines carry the gas north

[3] The trunks are not part of the North Padre Island or Central Texas subsystems. Pet. App. 157a-160a.

to onshore processing plants for delivery to Transco's mainline transportation system. *Id.* at 88a, 133a-134a.

The fourth subsystem, Central Louisiana, includes approximately 200 miles of offshore pipeline, Pet. App. 203a, 225a, arrayed in a "spine and lateral" configuration. The trunklines (the "spine") extend 42 miles from shore to Vermillion Block 67 on the OCS; laterals reach out to OCS production areas from the trunklines and from Vermillion Block 67. *Id.* at 225a-226a. The laterals deliver gas from wells located along their length to the trunklines, which in turn, transport the gas to Transco's processing plant on Cow Island, just off the coast of Louisiana. *Id.* at 226a.

In March 2001, Transco submitted an application pursuant to 15 U.S.C. 717f(b), seeking permission to abandon the four subsystems and transfer them to Transco's affiliate, Williams Gas Processing—Gulf Coast Company (Williams). Williams, in turn, petitioned for declaratory orders reclassifying the subsystems as gathering facilities. In three separate orders, FERC granted in part and denied in part the relief sought. Pet. App. 60a-97a, 127a-167a, 198a-234a.

FERC reclassified the North Padre and Central Texas subsystems, and the portion of the North High subsystem existing upstream of the central aggregation point, as gathering, while continuing to classify the facilities downstream of those points as transportation. Pet. App. 89a, 157a. As to the Central Louisiana subsystem, FERC reclassified the laterals that were located upstream of Vermillion Block 67, and those that intersected with the looped trunklines, as gathering, while continuing to classify the trunklines as transportation. *Id.* at 226a. FERC allowed Transco to spin down all of the subsystems (*id.* at 92a, 164a, 230a), but retained rate jurisdiction over those subsystems that it

had declined to reclassify as gathering. *Id.* at 89a-90a, 227a.

The reclassified facilities exhibit the following physical characteristics: extension into production areas for collection of large volumes of gas from numerous wells; lengths and diameters that are dictated by the production areas' distance from shore and output of gas; operating pressures derived from well pressure rather than compression; and, in the case of three of the subsystems, convergence into central aggregation points from which trunklines carry the gas onshore. Pet. App. 87a-89a, 157a-161a, 225a-227a.

Regarding the request for abandonment, FERC stated that "[s]ince the facilities proposed to be abandoned were certificated to transport natural gas in interstate commerce * * *, the abandonment of Transco's certificated interests in the OCS facilities requires Commission authorization under NGA section 7(b)." Pet. App. 68a, 137a, 205a. FERC then specifically found that, based on a variety of factors, "the public convenience and necessity" permit the requested abandonment and transfer. *Id.* at 69a, 137a, 206a. FERC also stated its opinion that "section 1(b) of the NGA exempts gathering from the jurisdiction of this Commission. Thus, if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion to withhold such authorization." *Id.* at 75a, 143a, 212a. FERC denied rehearing, "reaffirm[ing] [its] conclusion that the abandonment is required and in the public interest." *Id.* at 104a, 174a, 241a.[4]

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[4] Prior to the court of appeals' decision, FERC exercised its "in-connection-with" rate authority under 15 U.S.C. 717c(a), 717d(a) to order Transco to file a just and reasonable gathering

Petitioners subsequently challenged FERC's reclassifications, and Transco challenged FERC's refusal to reclassify all of its subsystems as engaged in gathering.

4. The court of appeals affirmed. Pet. App. 1a-20a. The court observed that affirmance of FERC's gathering classifications was "instructed by [*ExxonMobil*, 297 F.3d at 1084], where the court stated that it will defer to FERC's reasonable determinations regarding gathering status under * * * 15 U.S.C. § 717(b)." Pet. App. 2a. The court held that in this case "FERC considered the appropriate factors under the primary function test and sufficiently explained its reasoning." *Id.* at 3a. The court concluded that none of the petitioners had demonstrated that FERC's demarcations between gathering and transportation were outside "a zone of reasonableness," *id.* at 2a (quoting *ExxonMobil*, 297 F.3d at 1084), and that FERC had properly applied the modified primary function test that the court had upheld in *ExxonMobil*. *Id.* at 16a-17a. The court explained that "FERC gave reasoned consideration to each of the pertinent factors, and its factual conclusions are supported by substantial evidence in the record." *Id.* at 17a.

The court of appeals also rejected petitioners' contention that FERC improperly granted the abandonment requests under 15 U.S.C. 717f(b). The court held that "once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility." Pet. App. 19a. The court of appeals also found that, "even though

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rate for the North Padre subsystem, after finding that Transco and its affiliate had acted in concert to frustrate FERC's regulation. *Shell Offshore*, 103 F.E.R.C. at 61,661.

[FERC] lacked the authority to deny abandonment," FERC reasonably concluded that petitioners' public interest concerns "were unfounded." *Ibid.*

ARGUMENT

Petitioners renew their challenges to FERC's orders, contending that the Transco's entire system is engaged in jurisdictional transportation and that, assuming the reclassifications were proper, FERC was required by Section 7(b) of the NGA to find that the transfers of those facilities to Transco's affiliates were in the public interest. Neither of those contentions warrants this Court's review.

1. On August 14, 2003, FERC issued a public notice stating that on September 23, 2003, FERC would convene a public conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf and if so what the new test should be." Supp. Br. for the FERC App. at 1a-12a, *Producer Coalition* v. *FERC*, cert. denied, 124 S. Ct. 47 and 48 (2003) (Nos. 02-1215 and 02-1265) (*Notice of Public Conference, Application of the Primary Function Test for Gathering on the Outer Continental Shelf*, Docket No. AD03-13-000 (Aug. 14, 2003)). The Commission stated that its objective in issuing the notice was to develop a "clear, consistent approach to offshore gathering * * * to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function." *Id.* at 2a. FERC concluded that it would convene the public conference "to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the

regulatory goals of the Natural Gas Act." *Id.* at 10a. FERC also solicited comments on whether, "[i]f formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under [15 U.S.C. 717f(b)] before the facilities may be transferred to another company." *Id.* at 11a. The conference was held on September 23, 2003, at which petitioners submitted both written and oral comments. FERC is currently evaluating those and other comments, as well as continuing to receive comments from interested persons.

This Court should not address the legal, factual, and policy issues raised by the certiorari petitions before FERC has had the opportunity to receive public comment upon and consider (1) whether FERC should reformulate its test for determining nonjurisdictional gathering in the shallow waters of the OCS, and if so, what the relevant test and criteria should be, and (2) whether FERC should conduct abandonment proceedings for those formerly certificated facilities determined to be engaged in gathering. As FERC concluded, relevant to those questions are policy issues concerning the potential for "inconsistent classification and regulatory treatment" of similarly situated competitors as well as the impact on "customers who may have made investments relying on the regulated status of a transporter." Supp. Br. for the FERC App. at 10a, *Producer Coalition, supra* (Nos. 02-1215 and 02-1265).

Those and other policy issues, including the ones raised by petitioners (03-431 Pet. 27-29) are best directed in the first instance by FERC, which may reformulate its jurisdictional test for determining whether facilities operating in the shallow waters of the OCS are engaged in jurisdictional transportation or

nonjurisdictional gathering. Any new test would govern future requests to reclassify or abandon previously certificated transmission facilities. Moreover, should FERC adopt a new test, petitioners or Transco would be free to petition the FERC to reclassify some or all of Transco's facilities under 15 U.S.C. 717c, 717d, and 717f. Finally, because any review of the substance and application of the Commission's test would be subject to review under *Chevron*, this Court should decline review of the court of appeals' decision in view of FERC's Notice concerning the possible reformulation of its test.

2. Petitioners' highly technical and fact-bound challenge to FERC's reclassification determination also does not warrant this Court's review. In reclassifying some, but not all, of Transco's offshore system as gathering facilities, FERC rejected petitioners' position that *all* of the subject subsystems engage entirely in transportation, as well as Transco's contention that the entire North High Island, Central Louisiana and West Cameron subsystems engage in gathering. Correctly applying a deferential standard of review, the court of appeals held that FERC had reasonably reclassified portions of the subsystems based on its consideration of the particular physical factors in each case. For the reasons explained in our brief in opposition to the petitions for a writ of certiorari in No. 02-1215 (*Producer Coalition* v. *FERC*, 124 S. Ct. 47 (2003)) and No. 02-1265 (*ExxonMobil Gas Mktg.* v. *FERC*, 124 S. Ct. 48 (2003)), FERC's orders and the court of appeals' decisions in this case and *ExxonMobil* are entirely consistent with this Court's decision in *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84 (1963). Indeed, we are aware of no court decision (and petitioners cite to none) that supports

petitioners' novel view (03-431 Pet. 15-22; 03-147 Pet. 6) that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation. Quite to the contrary, those courts to have considered petitioners' contention have rejected it. *ExxonMobil*, 297 F.3d at 1085-1086; *Sea-Robin*, 127 F.3d at 369-371; *EP Operating*, 876 F.2d at 48-49.[5]

As the court of appeals properly found (Pet. App. 14a-17a), FERC's orders exhaustively reviewed the relevant physical criteria and specifically found that some (but not all) of Transco's systems were engaged in gathering. Petitioner's fact-bound contentions to the contrary merit no further review.[6]

3. a. The Shell Offshore petitioners, but not petitioner Producer Coalition, also argue (03-431 Pet. 25-27) that the court of appeals improperly permitted FERC to grant the abandonment of portions of Transco's facilities without finding the abandonment to be in the

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[5] Indeed, FERC's jurisdictional line-drawing is applied *more* favorably to producers offshore than onshore. In the offshore context, the gas does not enter the processing plant—where it attains pipeline quality—until it reaches shore. Pet. App. 64a, 131a, 201a. FERC nonetheless has determined that Transco's offshore gathering ends well upstream of the processing plant. *Id.* at 89a, 159a-160a, 226a.

[6] The Shell Offshore petitioners incorrectly suggest (03-431 Pet. 24) that FERC may classify a facility as engaged in gathering only if a State could regulate the activity under the Commerce Clause. Of course, the pipelines at issue here are offshore, and so acceptance of petitioners' contention presumably would mean that FERC lacks the authority to reclassify any pipeline even if it is unquestionably engaged in gathering functions. In any event, this Court has stated that Congress in the NGA "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power." *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

public interest under 15 U.S.C. 717f(b). That contention lacks merit.

The NGA bars any natural gas company from "abandon[ing] all or any portion of its facilities *subject to the jurisdiction of the Commission*, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that the present or future public convenience or necessity permit the abandonment." 15 U.S.C. 717f(b) (emphasis added). By its plain terms, the abandonment provision "covers only 'facilities subject to the jurisdiction of the Commission'" and cannot be used to expand FERC's authority "over the production and gathering of gas." *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 509 (1949) (quoting 15 U.S.C. 717f(b)). The court of appeals correctly held that "once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility." Pet. App. 19a.

In any event, this case would be an inappropriate vehicle in which to consider petitioners' contentions to the contrary because FERC granted the precise relief petitioners seek, *i.e.* a determination whether Transco's transfers would be in the public interest. As a result, although FERC expressed the view that the Commission lacked the discretion to deny abandonment of non-jurisdictional facilities, Pet. App. 75a, 143a, 212a, FERC also unquestionably found that "the public convenience and necessity" permitted Transco's requested abandonment and transfer to its affiliate. *Id.* at 69a, 137a, 206a.

Specifically, FERC observed that Transco had responded to FERC's unbundling policies in Order No. 636 by replacing its bundled services with "an array of

unbundled services, such as transportation, storage, and fully unbundled sales services, to a wide variety of customers." Pet. App. 68a-69a, 137a, 206a. Thus, "Transco no longer require[d] its extensive gathering facilities to provide [bundled] gas sales." *Id.* at 69a, 137a, 206a. FERC concluded that the proposed spin-down would permit "Transco to eliminate unnecessary expenses associated with these [reclassified] facilities" and Williams to "make efficient use of the acquired facilities to provide open access gathering service." *Id.* at 137a; see also *id.* at 69a, 206a. FERC also concluded that the transfer "is consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." *Id.* at 75a, 143a, 212a.

Significantly, FERC further explained that on approval of the spin-downs, the gathering facilities would be subject to the OCSLA, which would prevent Williams "from discriminating against any shipper that seeks access to the facilities." Pet. App. 76a, 144a, 213a. FERC also explained that Williams had represented to FERC that it would negotiate new agreements "with all shippers that should not result in degraded service." *Id.* at 76a, 144a. Finally, FERC pointed out that FERC's regulatory authority over Transco's tariffs would provide further protection. *Id.* at 77a, 145a.

On rehearing, FERC reiterated its conclusion that the transfers were in the public interest, rejecting petitioners' concerns that Williams would "be able to take advantage of its existing control of the [gathering] market in order to exact monopoly rents from shippers." Pet. App. 104a, 174a, 241a. FERC reaffirmed its findings that its unbundling policies "should, in the long run, promote competition"; that OCSLA would prevent Williams "from discriminating against any shipper"

seeking access to Williams' facilities; and that "Transco's existing tariff standards" would prevent the pipeline "from acting in a discriminatory manner." *Id.* 104a-105a, 174a, 241a. FERC also observed that Williams "has agreed to continue to serve Transco's existing customers following the facilities' transfer," thereby "avoid[ing] any abrupt disruption to Transco's customers' expectations." *Id.* at 104a-105a, 174a-175a, 241a-242a.

The court of appeals found those conclusions reasonable, explaining that "FERC has taken the long view, concluding that Order No. 636's unbundling policies create competitive conditions and that, combined with the standards of conduct for gathering facilities in Transco's tariff, the OCSLA sufficiently guards against the exercise of monopoly power." Pet. App. 19a. Significantly, petitioners do not challenge FERC's extensive factual findings or the court of appeals' affirmance of FERC's conclusions. There is accordingly no basis for this Court to grant plenary review simply to determine whether FERC was required to make the public interest determination that FERC in fact has already made.

b. Petitioners also argue (03-431 Pet. 25-27) that the court of appeals' conclusion that no public interest finding was necessary conflicts with the Fifth Circuit's decision in *Pacific Gas & Electric Co.* v. *FERC*, 106 F.3d 1190, cert. denied, 522 U.S. 811 (1997). As discussed above, however, resolution of that purported conflict would not aid petitioners, since FERC has already concluded that the transfers at issue in this case further the public interest. In any event, the court of appeals' decision does not squarely conflict with *Pacific Gas*, which did not even involve reclassified facilities. Rather, the Fifth Circuit in *Pacific Gas*

rejected FERC's assertion in that case that FERC lacked "the power to examine whether abandonment would be in the public interest when a pipeline is abandoning its gathering facilities *to a nonjurisdictional entity*." 106 F.3d at 1197 (emphasis added). The court reached the unremarkable conclusion that the jurisdictional status of the *transferee* is irrelevant, explaining that "it makes no difference who gets the facilities or, indeed, whether anyone gets them at all." *Ibid.*

Pacific Gas thus did not address the precise question addressed by the court of appeals in this case, *i.e.*, whether FERC must make a public interest finding when it reclassifies a facility as no longer engaged in jurisdictional services. Indeed, the court of appeals below apparently recognized the absence of a square conflict when it stated that "[w]e part company with [*Pacific Gas*] *to the extent it holds* that FERC has discretion to examine whether abandonment would be in the public interest." Pet. App. 19a (emphasis added).

Furthermore, as explained above (see pp. 10-12, *supra*), in its recent notice seeking public comment on various issues concerning the classification and reclassification of facilities on the OCS, FERC specifically solicited comments on whether it may require a company to file an application for abandonment under 15 U.S.C. 717f(b) before facilities that have been found to be nonjurisdictional gathering facilities are transferred to another company. As with the first question presented in the case concerning FERC's approach to distinguishing between gathering and transportation on the OCS, FERC should be give the opportunity to address the abandonment issue in the first instance before review by this Court. For this additional reason, review of the abandonment issue is not warranted in

this case even if the issue were otherwise appropriate for review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2003

Supreme Court, U.S.
FILED
DEC 1 _ 2003
OFFICE OF THE CLERK

No. 03-147 AND 03-431

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P., AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with this Court's *Chevron* principles, the Court of Appeals for the District of Columbia Circuit properly affirmed orders of the Federal Energy Regulatory Commission which ruled that: (1) certain offshore natural gas facilities are "gathering" facilities exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act ("NGA"); and (2) such NGA-exempt facilities are not subject to the abandonment requirements of NGA section 7(b).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the rules of this Court, Respondents Williams Gas Processing-Gulf Coast Company, L.P. ("WGP") and Transcontinental Gas Pipe Line Corporation ("Transco") state that:

The parent companies and any publicly-held company that have a 10% or greater ownership interest in WGP are:

The Williams Companies, Inc.
Williams Energy Services, LLC
Williams Field Services Group, Inc.
Williams Field Services Company
WGP Enterprises, Inc.

The parent companies and any publicly-held company that have a 10% or greater ownership interest in Transco are:

The Williams Companies, Inc.
Williams Gas Pipeline Company, LLC

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IN THE

Supreme Court of the United States

No. 03-147

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

No. 03-431

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P., AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

Respondents Williams Gas Processing-Gulf Coast Company, L.P. ("WGP") and Transcontinental Gas Pipe Line Corporation ("Transco") respectfully request that this Court deny the above-captioned petitions for writs of certiorari,

which seek review of *Williams Gas Processing–Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) ("*Williams*"). Transco is a natural gas pipeline engaged in the transportation of natural gas subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or the "Commission") under the Natural Gas Act ("NGA"). 15 U.S.C. § 717, *et seq.* WGP is an affiliate of Transco that owns and operates NGA-exempt "gathering" facilities located primarily on the Outer Continental Shelf ("OCS") of the Gulf of Mexico. In *Williams*, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld FERC orders ruling that certain of Transco's OCS pipeline facilities are NGA-exempt "gathering" facilities which Transco is authorized to transfer to WGP. Petitioners assert that the orders affirmed in *Williams* reflect an impermissible interpretation of the NGA's gathering exemption and abandonment requirements. WGP and Transco respectfully submit that the D.C. Circuit, in affirming FERC's orders, properly applied the two-step analysis prescribed by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Accordingly, review by this Court is unwarranted.

SUMMARY

The instant petitions present essentially the same issues raised by virtually the same Petitioners in recently seeking review of *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002).[1] This Court denied those earlier

[1] The Producer Coalition characterized its *Williams* petition (at 2) in Case No. 03-147, filed July 25, 2003, as a "follow along petition" to the earlier petitions of *ExxonMobil* filed in *The Producer Coalition v. FERC*, Case No. 02-1215, and *ExxonMobil Gas Marketing Co. v. FERC*, Case No. 02-1265. Shell Offshore Inc., *et al.*, in their petition in Case No. 03-431 (at 1), filed September 15, 2003, note the "close relationship" between the *Williams* and *ExxonMobil* decisions and the "[s]ubstantially similar issues presented." ("Petition No. 03-431")

petitions on October 6, 2003, and denial is appropriate again here. Indeed, Petitioners had requested "in tandem" consideration of the *ExxonMobil* and *Williams* petitions "because they involve the same issues and the *Williams* decision below relies heavily on *ExxonMobil*."[2] Moreover, shortly after *Williams* was decided, certain of the *ExxonMobil* Petitioners filed a Supplemental Brief addressing the issues presented by *Williams* as support for review of *ExxonMobil*.[3] Thus, this Court has already seen and rejected the Petitioners' arguments for review based on *Williams*.

Denial of review again is supported by a number of factors. First, as noted in FERC's Supplemental Brief opposing the *ExxonMobil* petitions, FERC has recently initiated a comprehensive review of the OCS jurisdictional test and abandonment policy applied in *Williams*. *See Notice of Public Conference, Application of the Primary Function Test on the Outer Continental Shelf*, Docket No. AD03-13-000 (August 14, 2003). (App. 1a). As part of that process, FERC has asked for suggestions from interested persons on developing a new test for gathering on the OCS. *Id.* at 9a. WGP and Transco (through their parent The Williams Companies, Inc.), as well as each of the Petitioners, filed comments proposing significant changes to the Commission's current OCS jurisdictional test and policies. These complex, fact-oriented jurisdictional issues are best addressed in the first instance by the FERC.

Second, the central concern that Petitioners allege in support of review, *i.e.*, that FERC's relinquishment of NGA jurisdiction will subject OCS shippers to the unconstrained

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[2] Petitioners' Joint Motion to Defer Consideration of Petitions for Writ of Certiorari to Subsequent Conference, at 3-4, filed Sept. 12, 2003 in Case Nos. 02-1215 and 02-1265.

[3] Supplemental Brief of ExxonMobil Gas Marketing Co., *et al.*, filed June 23, 2003 in Case No. 02-1265.

monopoly power of OCS pipelines, is simply incorrect. Petitioners disregard the fact that Congress enacted the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*, to guarantee shippers open and nondiscriminatory access to all OCS pipelines, including NGA-exempt gathering lines. Moreover, many OCS pipelines, some owned by Petitioners, have never been regulated under the NGA.

Finally, Petitioners' jurisdictional theories would jettison the legal basis that has governed more than fifty years of natural gas industry regulation, including the past two decades of industry restructuring that has increased competition and market access through the "unbundling" of natural gas sales, transportation, and gathering services.

STATUTES INVOLVED

In addition to the statutes attached to the petitions, this case involves various provisions of the OCSLA, which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

This case concerns applications filed by Transco to transfer (*i.e.*, "spindown") certain OCS pipeline facilities to WGP, and WGP's related requests that FERC confirm those facilities to be NGA-exempt "gathering." FERC approved the spindowns in part, finding that some of the subject facilities function as NGA-exempt gathering, but also denied in part, finding that other of the subject facilities function as jurisdictional transportation facilities.[4] Transco

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[4] *See* Petition No. 03-431 at App. 21a-263a. Given FERC's denial of substantial portions of the requested relief (together with FERC orders in other pending proceedings also adversely impacting the spindowns), Transco/WGP's proposed spindowns have not yet been implemented, with the exception of the transfer of portions of the North Padre Gathering System. The remaining OCS facilities that were subject to the spindowns (*i.e.*, the Central Texas, North-High-Island/West-Cameron, and Central Louisiana gathering systems) continue to be owned by Transco.

and WGP appealed FERC's orders to the D.C. Circuit, claiming that FERC should have found that all of the subject facilities are NGA-exempt gathering, while Petitioners appealed to the D.C. Circuit claiming that none of the subject facilities constitute NGA-exempt gathering. In *Williams*, the D.C. Circuit denied all of the petitions and affirmed FERC's orders.

The spindown of NGA-exempt "gathering" by interstate pipelines is an outgrowth of congressional and regulatory enactments that restructured the natural gas industry. By way of background, since the NGA's inception in 1938, section 1(b) has stated that the NGA "shall not apply to . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Consistent with that statutory restriction, FERC never regulated gathering performed by "independent" gatherers, *i.e.*, those that do not also provide bundled NGA-jurisdictional services. In contrast, gathering and production activities performed by interstate pipelines were historically FERC-regulated because those activities were "bundled" with the pipelines' NGA-jurisdictional sales and transportation services.[5]

In the 1970s, the structure of the natural gas industry changed dramatically in response to the failure of gas price controls and resulting gas shortages. *See United Distr. Cos. v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996). Those circumstances prompted Congress to enact measures to limit regulation and foster competition in the natural gas industry. For example, the Natural Gas Policy Act of 1978, 15 U.S.C.

Accordingly, FERC continues to exercise NGA rate jurisdiction over those facilities owned by Transco.

[5] Such authority was recognized by this Court in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (NGA "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company . . . for the purposes of determining the reasonableness of rates subject to its jurisdiction").

§ 3301, *et seq.*, required the phased deregulation of wellhead prices for certain categories of gas, and later the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989), phased out all remaining wellhead price controls. Following Congress' lead, FERC established a program of open-access and nondiscriminatory transportation, and later mandated the unbundling of gas sales and transportation. *Conoco Inc. v. FERC*, 90 F.3d 536, 539-40 (D.C. Cir. 1996). Congress saw the Commission's implementation of open-access transportation as "essential" to its decision to deregulate wellhead sales. *See United Distribution*, 88 F.3d at 1125.

This industry restructuring ended the interstate pipelines' decades-old role as merchants of "bundled" service (*i.e.*, purchasing, gathering, transporting, and reselling natural gas as a single service) and transformed them into open-access transporters. *See id.* at 1122-30. Absent their former merchant sales obligations, pipelines no longer needed to own extensive gathering systems to secure gas supplies (*see Conoco*, 90 F.3d at 539-41), and pipelines began "unbundling" their NGA-exempt gathering facilities from their NGA-regulated transportation facilities. To facilitate unbundling, FERC required pipelines to "'separately identify cost components attributable to transportation, storage, and gathering costs.'"[6] With gathering unbundled as a stand-alone service, various interstate pipelines transferred their gathering facilities to non-NGA-regulated companies that could compete on equal footing with non-NGA-regulated

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[6] *Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295, at 62,059 (1989) (quoting regulations now codified at 18 C.F.R. § 284.10(c)). *See also Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates*, 65 FERC ¶ 61,136, at 61,690 (1993) ("The Commission has required gathering rates to be separately stated and unbundled from mainline transportation rates in a number of restructuring cases.").

independent gatherers, including a number of the Petitioners (or their affiliates). *See Conoco*, 90 F.3d at 541. While the unbundling of *onshore* gathering facilities has largely been completed with court approval,[7] pipelines such as Transco likewise have requested FERC jurisdictional determinations to unbundle *offshor*e gathering facilities.

In tandem with these pro-competitive restructuring initiatives, Congress amended and strengthened the OCSLA to ensure the expeditious and orderly development of OCS resources consistent with certain "competitive principles" to protect OCS shippers. *See* OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). Among other things, the OCSLA requires *all* OCS pipelines to "provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A).

REASONS FOR DENYING THE PETITIONS

A. FERC Has Initiated A Comprehensive Review Of The OCS Gathering Policy Applied In *Williams*.

On August 14, 2003, FERC issued a Notice of Public Conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." (App. 1a). *See also*, FERC's Supplemental Brief opposing the *ExxonMobil* Petitions denied in Case Nos. 02-1215 and 02-1265. FERC's Notice reviewed the history and evolution of its jurisdictional test for NGA-exempt gathering and expressed dissatisfaction with the reformulated primary function test applied in *ExxonMobil* and *Williams*. (App. 1a-9a). Thus, FERC scheduled, and ultimately convened, a public conference on

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[7] *See Conoco, supra; Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997); *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193 (D.C. Cir. 2000).

September 23, 2003 "to hear suggestions from interested persons on developing a new test for gathering on the OCS . . . [that would] provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated market power of third party transporters." (App.9a). FERC also invited the submission of written comments. (App.10a).

FERC's Notice listed four questions to be addressed, which questions encompass all of the issues presented herein by Petitioners:

> 1. To what extent should a gathering test that [sic] be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?
>
> 2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?
>
> 3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?
>
> 4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas [A]ct before the facilities may be transferred to another company?

(App. 9a-10a).

FERC developed an extensive record from a diverse group of market participants regarding these OCS jurisdictional and policy questions. FERC is now considering these issues with

the benefit of actual operating experience under the reformulated test applied by FERC in *ExxonMobil* and *Williams*, and with the benefit of broad industry input. Each of the Petitioners actively participated by presenting a representative at the public conference and/or through written comments (pre- and post-conference). Significantly, the Producer Coalition (Petitioners in Case No. 03-147) proposed that, for a one-year period after the adoption of a new jurisdictional test, "all cases decided since June 30, 1999 [*i.e.*, the date FERC adopted the reformulated test in *ExxonMobil*] that reclassified existing jurisdictional facilities to gathering should be open to review." *Post-Conference Comments of the Producer Coalition*, Docket No. AD03-13-000, at 3 (October 3, 2003). While FERC has not yet taken any formal action in response to the conference, it is appropriate that FERC in the first instance apply its expertise, with industry guidance, to these complex OCS jurisdictional and policy questions. Similarly, it makes little sense for this Court to devote its resources to reviewing the current jurisdictional test that is being reconsidered and likely revised. For these reasons, the Petitions should be denied.

B. There Is No Regulatory Gap With Respect To NGA-Exempt Gathering Lines On The OCS.

Petitioners argue that FERC's non-jurisdictional determinations affirmed in *Williams* will leave OCS shippers subject to the unconstrained market power of NGA-exempt pipelines. That assertion is untrue because the OCSLA protects all shippers on all OCS pipelines, including NGA-exempt gathering lines. Petitioners' claim is also misleading because about half of the OCS pipeline facilities have never been NGA regulated.[8]

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[8] *See Transcontinental Gas Pipe Line Corp.*, 97 FERC ¶ 61,298, at 62,400 (2001) ("While almost all NGA-regulated pipe is located in

When Congress amended the OCSLA in 1978 (at about the same time that it commenced decontrol of wellhead gas prices), it specifically rejected an amendment to extend NGA jurisdiction to all OCS gas pipelines. 124 Cong. Rec. 2092-93 (Feb. 2, 1978). Moreover, Congress recognized that "the Outer Continental Shelf is a vital national resource . . . which should be made available for expeditious and orderly development . . . in a manner which is consistent with the maintenance of *competition* and other national needs." 43 U.S.C. § 1332(3) (emphasis added). *See also* 43 U.S.C. § 1801(7) (finding that the OCS must be managed "to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) (a purpose of the Act is "to preserve and maintain free enterprise competition"); 43 U.S.C. § 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition"); 43 U.S.C. § 1334(f) (mandating "competitive principles" to govern OCS pipeline operations).

Chief among those "competitive principles" was Congress' mandate that every OCS permit or other grant of authority require that the OCS pipeline "must provide open and non-discriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334 (f)(1)(A). Other sections of the OCSLA allow FERC in appropriate circumstances to allocate pipeline capacity in "proportionate amounts" (43 U.S.C. § 1334 (e)), order pipeline expansions (43 U.S.C. § 1334 (f)(1)(B)), and condition permits to ensure compliance with the OCSLA's "competitive principles." 43 U.S.C. § 1334 (f)(1). Violators of the OCSLA are subject to injunctions and civil and criminal penalties (43 U.S.C. § 1350), as well as citizens suits. 43 U.S.C. § 1349.[9] In short, Congress was well aware that its

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shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and gathering facilities.").

[9] In *The Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003), the court held that while FERC has certain specific grants of authority in OCSLA sections 1334 (e) and (f), it does not have general enforcement

OCSLA regulatory scheme would leave OCS "gathering" pipelines exempt from NGA rate regulation, but chose instead to regulate OCS pipelines by enhancing "competition" and providing comprehensive non-NGA mechanisms, described above, to prevent abuse in the marketplace.[10]

C. *Williams* Is Consistent With *Northern Natural* and Other Decisions Of This Court and The Circuits.

The decision below properly applied *Chevron's* two-step analysis in reviewing FERC's interpretation of the term "gathering" as used in NGA section 1(b). In that regard, no party disputes that, in the NGA, Congress has not "directly spoken to" the meaning of the term "gathering." *Chevron*, 467 U.S. at 842. Thus, the reviewing court's task is to determine "whether the agency's answer is based on a permissible construction of the statute" (*id.* at 843), and it must accord "deference" and "considerable weight" to the agency's construction. *Id.* at 844. Petitioners argue that FERC's interpretation of NGA section 1(b) conflicts with *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963) and other decisions of this Court and the Circuits. Petitioners have misconstrued the applicable precedent.

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authority. The authority to administer and enforce the OCSLA is granted to other agencies, such as the Secretary of Interior, the Attorney General, and the Secretary of Energy. *See, e.g.*, 43 U.S.C. §§ 1331(b), 1334(a) (c) (e) (f) (g) (h) (i), 1349, 1350.

[10] Of course, a purported "regulatory gap" cannot support Commission jurisdiction over facilities that otherwise qualify as exempt "gathering." *ExxonMobil*, 297 F.3d at 1088 ("We emphatically agree that 'need for regulation cannot alone create authority to regulate'") (quoting *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997)); *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1412 (10th Cir. 1990) ("If, upon proper application of the primary function test, the facilities are indeed exempt from Commission jurisdiction, whatever 'attractive [regulatory] gap' results was clearly created by Congress.").

1. *Northern Natural* is a preemption case that concerned orders of the Kansas State Corporation Commission requiring pipelines to purchase gas "ratably" from all Kansas wells to which they are connected. *Id.* at 86. This Court rejected the argument that the NGA's "production or gathering" exemption allowed the state to dictate the manner in which sales are made in interstate markets. *Id.* at 89-93. The Court explained that "'production' and 'gathering' are terms narrowly confined to the *physical* acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Id.* at 90 (emphasis added). Thus, the holding of *Northern Natural* focused upon the "physical" basis for NGA-exempt gathering, as distinct from business activities such as gas sales conducted from the gathering facilities.[11]

Petitioners erroneously claim that *Williams* conflicts with *Northern Natural*. First, Petitioners argue that *Northern Natural* reflects a "bright line" dividing state and federal jurisdiction based on Congress' purported intent in the NGA to extend federal jurisdiction to the full extent of its authority under the Commerce Clause. Petition No. 03-431 at 16-17. However, *Northern Natural* says no such thing, and Petitioners cite nothing in *Northern Natural* to support their theory. More importantly, Petitioners' interpretation of *Northern Natural* is flatly contradicted by this Court's recognition that:

> When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. *It "**did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power**.*

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[11] *See also, Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, 681 (1954) ("[T]he 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas," but not to "the 'business' of production or gathering, with the sale of the product considered an integral part of such 'business.'").

> Rather it contemplated the exercise of federal power as specified in the Act." *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503 (1949). Indeed, Congress went so far in § 1(b) of the NGA, 15 U.S.C. § 717(b), as to prescribe not only "the intended reach of the [federal] power, but also [to] specif[y] the areas into which this power was not to extend." 337 U.S. at 503. Section 1(b). . . ***expressly reserv[ed] to the States the power to regulate, among other things "the production or gathering of natural gas . . . ."***

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 510 (1989) (emphasis added). *See also*, *Sea Robin* , 127 F.3d at 368 (5th Cir. 1997); *ExxonMobil*, 297 F.3d at 1076.

Petitioners further argue that *Williams* (and *ExxonMobil* on which it relies) conflict with *Northern Natural* because FERC failed to show that the facilities ruled to be gathering were confined to the "physical acts of drawing gas from the earth and preparing it for the first stages of distribution," nor that such facilities "relate . . . to established matters of 'local concern.'" Petition No. 03-431 at 19-20. To the contrary, FERC satisfied those standards by applying the physical criteria of its "primary function" test to distinguish NGA-exempt gathering from NGA-jurisdictional transmission.

For over fifty years, the Commission has relied on pertinent physical criteria to distinguish exempt gathering from jurisdictional transportation, and since 1983 those criteria have been embodied in the Commission's "primary function" test. *ExxonMobil*, 297 F.3d at 1077. The primary function test considers: (1) length and diameter of the pipeline; (2) extension of the facility beyond the central point in the field; (3) geographic configuration of the facility; (4) location of compressors and processing plants; (5) location of wells along all or part of the facility; and (6) operating pressure of the lines. *Id.* The oldest of

those criteria is factor (4), referred to as the "behind-the-plant test," dating back to the landmark decision in *Phillips, supra* (reversing Commission decision to exempt gas sales from NGA jurisdiction, but leaving intact the exemption of gas processing plants and the upstream facilities delivering gas to them). In its order underlying *Phillips*, the Commission explained the rationale for the behind-the-plant test, stating:

> [W]e find the movement of gas by Phillips to those [processing] plants to constitute gathering within the meaning of section 1(b). In each instance, the gas is collected to a common point in or relatively near the plant *where processing occurs to make the gas salable* or to recover extractable products or both.

Phillips Petroleum Co., 10 FPC 246, 277 (1951) (emphasis added).

The physical factors of the Commission's primary function test are fully consistent with the Court's recognition in *Northern Natural* that gathering involves "preparing [the gas] for the first stages of distribution." 372 U.S. at 90. As noted by the passage above, prior to processing (to remove extractable products and impurities), the gas is not salable, consumable, or fungible, and therefore is not ready for the "first stages of distribution."[12] Thus, the "distribution" of gas cannot begin until the collection process (including gathering and processing) has been completed. For more that 50 years,

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[12] Despite Petitioners' repeated references to "consumer protection" concerns, the raw, unprocessed gas moved by OCS gathering pipelines is not suitable for sale to consumer markets and indeed no such consumer markets exist on the OCS. Rather, in the restructured natural gas industry, gas prices are set by competitive forces at market "hubs" located well downstream of the production fields and well upstream of the consumers, with participants in the field-area operations (including producers and gatherers) allocating their respective shares of these downstream market-set prices on a "netback" basis. *See Shell Gas Pipeline Co.*, 78 FERC ¶ 61,192, at 61,828-29 (1997) (Santa, Comm'r dissenting).

the Commission has applied its primary function and behind-the-plant tests in scores of cases to identify NGA-exempt gathering both onshore and offshore.

2. While Petitioners focus their anguish on FERC's use of the "central aggregation" factor in reformulating the primary function test in *ExxonMobil* and *Williams*, Petitioners cry largely "crocodile tears." That is because the central aggregation factor was added by FERC to *restrict* the scope of facilities qualifying as NGA-exempt gathering. Specifically, FERC determined that "the 'behind-the-plant' test is not determinative of the gathering question offshore, and that instead it would look at the offshore system's configuration to locate a central point where gas is aggregated for transportation onshore." *Williams*, 331 F.3d at 1014. Thus, FERC used the central aggregation factor in the orders underlying *ExxonMobil* and *Williams* to establish jurisdictional demarcation points well *upstream* of the onshore processing plants, thereby denying the requests of Sea Robin and Transco for nonjurisdictional treatment for *all* facilities upstream of (*i.e.*, "behind") the processing plants. *Id. See also, Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,118, at 61,458-60 (2001); *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,246, at 61,976-77 (2001).

The Petitioners' position that the offshore production platforms should serve as the jurisdictional demarcation, which would have resulted in the entirety of Transco's and Sea Robin's OCS facilities being classified as NGA-jurisdictional transportation, has been consistently rejected by the courts. *See EP Operating Co. v. FERC*, 876 F.2d 46, 49 (5th Cir. 1989) (reversing FERC's assertion of jurisdiction over the entirety of an OCS gathering system and rejecting FERC's finding that "the floating [production] platform would be the central point in the field."); *ExxonMobil*, 297 F.3d at 1085 ("This same decision [*EP Operating*] weighs against FERC's treating the production platforms as central

aggregation points as well."); *Sea Robin*, 127 F.3d at 367 (vacating and remanding FERC's assertion of jurisdiction over the entirety of Sea Robin's OCS system which has its upstream termini at the OCS production platforms). The Petitioners' jurisdictional test has never been upheld by a court, and its adoption would overturn more than 50 years of established precedent regarding the primary function test.

The cases cited by Petitioners fail to support their position. For example, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), and *Hughes Brothers Timber Co. v. Minnesota*, 272 U.S. 469 (1926), concerned the lawfulness under the Commerce Clause of certain state taxes, which turned on determining where the local activity of gathering ceased and interstate commerce commenced. However, as discussed above, in exempting production and gathering from the NGA, Congress "'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act.'" *Northwest Central*, 489 U.S. at 510 (quoting *Panhandle*, 337 U.S. at 502-503). Thus, the scope of NGA-exempt gathering is not limited by the full constitutional breadth of interstate commerce. In any event, in *Michigan-Wisconsin*, the tax was levied on "the taking of gas from the outlet of an independent gasoline plant" (347 U.S. at 161), which the Court found unlawful because "the State has delayed the incidence of the tax beyond the step where ***production and processing have ceased*** and transmission in interstate commerce has begun." *Id.* at 167 (emphasis added). Thus, *Michigan-Wisconsin* is fully consistent with the "behind-the-plant" test for gathering, under which NGA-exempt gathering continues until after processing of the gas has been completed.[13]

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[13] The other cases relied on by Petitioners (Petition No. 03-431 at 15-18) are likewise readily distinguishable as cases turning on the express grant of power in the NGA over sales for resale. *Exxon Corp. v.*

3. Finally, the erroneous nature of Petitioners' restrictive interpretation of NGA section 1(b) is further demonstrated by the fact that gathering commonly occurs in very large pipeline networks that extend *across state borders* and undeniably operate in interstate commerce. In fact, the gathering systems involved in *Phillips* consisted of "nine such networks of pipelines" of which "five are located entirely in Texas, one in Oklahoma, one in New Mexico, and *two extend into both Texas and Oklahoma*." *Phillips*, 347 U.S. at 675 (emphasis added). In this regard, "the fact that the subject pipeline facility crosses . . . state borders neither affects the NGA Section 1(b) [gathering] exemption nor precludes classification of the facilities in question as gathering." *Sid Richardson Energy Servs., Ltd.*, 104 FERC ¶ 61,024, at P 12 (2003). *See also, Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,191, at 61,769 (1998); *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,045, at 61,7211, n.22 (1997); *The Superior Oil Co.*, 13 FERC ¶ 61,218, at 61,497 (1980).[14]

Eagerton, 462 U.S. 176, 184 (1983) merely recognized that the NGA preempted state regulation of "wholesale sales of natural gas in interstate commerce," but says nothing regarding the scope of NGA-exempt gathering. Similarly, *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 691-93 (1947) ruled that *sales for resale in interstate commerce* are not exempted from federal jurisdiction by the gathering and production exemption, and *Phillips, supra*, 347 U.S. at 684-85, held that the FPC (predecessor to FERC), has authority to regulate rates for such *sales for resale in interstate commerce* made by an independent gathering company.

[14] Likewise, a number of Circuit decisions have recognized that NGA-exempt gathering can occur in large pipeline systems operating in interstate commerce. *See e.g., Pacific Gas & Electric*, 106 F.3d at 1193 (affirming the Commission's relinquishment of NGA jurisdiction over twenty-nine gathering facilities in New Mexico, Colorado, Oklahoma, and Texas); *Northwest Pipeline*, 905 F.2d at 1404 (overturning FERC's assertion of jurisdiction over six gathering facilities in Colorado and Utah); *Conoco*, 90 F.3d at 541-50 (affirming FERC's relinquishment of jurisdiction over gathering facilities located at 105 sites in Arkansas,

D. NGA Abandonment Requirements Do Not Apply To NGA-Exempt Gathering Facilities.

Petitioners erroneously claim that FERC was required to conduct a public-interest "abandonment" analysis under NGA section 7(b) with respect to facilities found to be NGA-exempt gathering. In *Panhandle*, 337 U.S. at 509, this Court, relying on the plain words of the statute, held that the abandonment requirements of NGA section 7(b) apply only to "facilities subject to the jurisdiction of the Commission," and not to "gathering" facilities exempt from the NGA under section 1(b). The Court there rejected arguments of the Federal Power Commission (now FERC) that otherwise exempt production or gathering facilities would be subject to section 7(b):

> The argument here is that since natural gas is the "lifeblood" of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. *The section, like those above, covers only "facilities subject to the jurisdiction of the Commission."*
>
> *To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act . . . .*

Id. at 509 (footnotes omitted) (emphasis added).[15]

Louisiana, Oklahoma, and Texas); and *Lomak*, 206 F.3d at 1195-98 (affirming FERC's relinquishment of jurisdiction over a gathering system located in New York and Pennsylvania).

[15] The abandonment cases cited by Petitioner (Petition No. 03-431 at 25-27) are off point, because they involved the abandonment of *NGA*-

Nor are Petitioners correct in claiming that there is a genuine split in the Circuits on the abandonment issue. In *Williams*, consistent with this Court's precedent cited above, the D.C. Circuit held that "section 7(b) only applies to jurisdictional facilities, and 'do[es] not expand [FERC's] section 1(b) jurisdiction.'" *Williams*, 331 F.3d at 1022 (quoting *ExxonMobil*, 297 F.3d at 1088 (quoting *Conoco*, 90 F.3d at 553)). While apparently unconvinced of any conflict, the D.C. Circuit further stated (*id.*) that "[w]e part company with the Fifth Circuit's opinion in *Pacific Gas & Electric*, 106 F.3d 1190, ***to the extent that*** it holds that FERC has discretion to examine whether abandonment [of exempt gathering facilities] would be in the public interest" (emphasis added). However, the Fifth Circuit was not called on to decide that same abandonment issue. That issue was not presented in *Pacific Gas & Electric* because the pipeline there sought abandonment authority from FERC (albeit unnecessarily), FERC nonetheless granted the abandonment, and the Fifth Circuit ruled that any need to address the public convenience and necessity had been satisfied. *Pacific Gas & Electric*, 106 F.3d at 1197.

The issue presented in *Pacific Gas & Electric* was "whether the Natural Gas Act supplies [FERC] with jurisdiction over [NGA-exempt] gathering facilities operated by a corporation that is wholly-owned by an [NGA-jurisdictional] interstate natural gas pipeline company." *Id.* at 1193. Regarding that jurisdictional issue, the Fifth Circuit *followed the D.C. Circuit's lead*, citing the D.C. Circuit's decision in *Conoco*:

> [T]he *Conoco* court is correct . . . The statute itself states that it does not apply to *gathering* activities.
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> * * *

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jurisdictional sales or transportation services. Thus, those cases do not support the applicability of NGA abandonment requirements to the *NGA-exempt* gathering *facilities* at issue in *Williams*.

> In sum, *we choose to follow the D.C. Circuit's lead* and hold that FERC construed the Natural Gas Act reasonably when it determined that *gatherers are outside of its statutory jurisdiction* even if they are wholly-owned subsidiaries of interstate pipeline companies.

Id. at 1196-97 (emphasis added). The Fifth Circuit's further statements which Petitioners' attempt to portray as a potential conflict (Petition No. 03-431 at 26-27) were merely *dicta,* addressing FERC's response to an argument raised by other parties and, more specifically, what "FERC's response to this argument *curiously suggests,*" *i.e.*, a lack of power in the context of abandoning to a "*nonjurisdictional entity*." *Pacific Gas Electric, 106 F.3d at 1197.* (emphasis added). Moreover, the Fifth Circuit found that "*any* error" on FERC's part regarding abandonment authority "was inconsequential." *Id.* Accordingly, as to the jurisdictional issue presented in *Pacific Gas & Electric,* the Fifth Circuit followed the D.C. Circuit, and the Fifth Circuit's further statements in *dicta* present no genuine conflict that would warrant this Court's review.

CONCLUSION

Wherefore, Respondents WGP and Transco respectfully submit that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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December 1, 2003

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. AD03-13-000

Application of the Primary
Function Test for Gathering on
The Outer Continental Shelf

NOTICE OF PUBLIC CONFERENCE

(August 14, 2003)

Take notice that on September 23, 2003, the Commission will convene a public conference in the above captioned proceeding. The purpose of the conference will be to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be.

The Commission has considered its offshore gathering policy a number of times in the past decade.[1] Nevertheless, a

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[1] *See generally* Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates—Issues Related to Rates and Terms and Conditions of Service, Docket No. RM94-4-000, Notice of Public Conference, 65 FERC ¶ 61,136 (1993); Gas Pipeline Facilities and Services on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, Docket No. RM96-5-000, Policy Statement, 74 FERC ¶ 61,222 (1996) (1996 Policy Statement); *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C., January 11, 2002), *appeal pending sub nom.* Williams Companies, *et al. v. FERC*, No. 02-5056 (D.C. Cir.) (appeal of district court ruling on motion that FERC did not have authority under the Outer Continental Shelf Lands Act (OCSLA) to issue regulations requiring gas service providers on the Outer Continental Shelf (OCS)to submit quarterly reports of services provided).

satisfactory definition of gathering under the Natural Gas Act has remained elusive. A clear, consistent approach to off-shore gathering is needed to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function.

Background

A. Evolution of the Primary Function Test

Although section 1(b) of the Natural Gas Act states that the provisions of that act do not apply "to the production or gathering of natural gas," the act itself does not define those terms. The Commission has defined gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." [2] The Supreme Court has added that "production" and "gathering" are terms "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."[3] These definitions have been useful in describing gathering as a concept. Nevertheless, as the courts have recognized, "the line between gathering and transportation is inherently elusive."[4] Attempts to establish a functional test, useful in the

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[2] *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C. Cir 2000), *quoting from* Barnes Transportation Company, 18 FPC at 372 (1957). *See also Conoco, Inc. v. FERC*, 90 F.3d 536, 539 n.2 (D.C. Cir. 1996)("Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through the pipeline's principal transmission system.") (quoting *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)).

[3] *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

[4] *Exxon Mobil Gas Marketing Company v. FERC (Exxon)*, No. 00-1355 (D.C. Cir. August 6, 2002) (Judge Edwards dissenting) slip op. at 18, citing *Conoco, Inc. v. FERC* 90 F. 3d 536 at 542 (D.C. Cir. 1996).

context of specific proceedings, resemble the pursuit of a desert mirage. Historically, the tendency has been to announce a particular physical characteristic that could be used to identify nonjurisdictional gathering, only to substitute other criteria later to reflect changes in the industry or in the evolution of Commission policy.[5] In *Farmland Industries, Inc.*,[6] the Commission identified a number of factors for consideration in analyzing the section 1(b) gathering test, and stated that "the ultimate test is whether the primary function can be classified as transportation or gathering." The primary function test factors included:

- the length and diameter of a pipeline (longer and wider pipe indicating transportation);
- the central point in a field;

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[5] For many years, the Commission employed two principal tests to differentiate (primarily onshore) transportation from gathering facilities. The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are non-jurisdictional gathering lines, while facilities downstream of the processing plant are presumptively transportation facilities. *See Phillips Petroleum Co.*, 10 FPC 246 (1951), *rev'd in part on other grounds sub nom. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). For gas that required no processing, the "central-point-in-the-field" test applied, under which lateral lines that collect gas from separate wells before converging into a larger single line —typically at the point where the gas is compressed for transportation by the pipeline—were classified as gathering facilities. *E.g.*, Barnes, *supra*.

[6] 23 FERC ¶ 61,063 at 61,143 (1983). The Commission later added a number of "non-physical" criteria, including (1) the purpose, location and operation of a facility; (2) the business of the owner; (3) whether the jurisdictional determination is consistent with the objectives of the NGA and other legislation; and (4) the changing technical and geographic nature of exploration and production. *Amerada Hess Corp.*, 52 FERC ¶ 61,268 at 61,844-45 (1990). Under the primary function test, no one factor is determinative, nor do all factors apply in every situation. *See, e.g., Williams Field Services*, 194 F.3d at 116; *Farmland*, 23 FERC at 61,143.

- the pipeline's geographic configuration (a web-like pattern, for example, suggesting a gathering function)
- location of compressors and processing plants (i.e., the "behind the plant" test);
- the location of wells along all or part of the facilities (typically indicating gathering); and
- operating pressure of a line, with higher pressure generally associated with the need to propel gas in a transportation function

The primary function test has been relatively satisfactory for analyzing onshore facilities. Offshore, however, the test has proven more difficult to apply.[7] Thus, in *EP Operating Co. v. FERC*, 876 F.2d 46, 48-49 (5th Cir. 1989), the Commission initially ruled that under the primary function test the offshore platform where initial gas treatment took place constituted a "central point in the field" where the gathering function was complete, and therefore the 51-mile long, 16-inch diameter OCS pipeline downstream of the platform at issue in that case was a jurisdictional transportation facility. The court reversed that finding, holding that while the length and diameter of pipeline facilities might indicate a transportation function onshore, those factors had less weight in the offshore context because of the longer distances between the point of production in deep water and the nearest

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[7] As more new facilities were constructed offshore on the OCS, where the pattern of gathering and distribution differs, the applicability of the factors was questioned. Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a producing field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, they construct relatively long lines to carry the raw gas from offshore platforms, where after production only rudimentary gas treatment takes place (primarily to remove water), to the shore or a point closer to shore where it can be processed into "pipeline quality" gas that can be transported by an interstate pipeline.

connection with an interstate pipeline. The court further questioned the validity of a central-point-in-the-field analysis applied to unitary OCS structures.

In response, the Commission modified its primary function test for the OCS, stating that as drilling operations pushed further offshore from existing interstate pipeline connections, it would apply a sliding scale to allow for the increasing length and diameter appropriate for gathering lines in correlation to the distance from shore and the water depth of the offshore production area. [8] Later, following a conference on offshore gathering in Docket No. RM96-5-000, the Commission issued a policy statement announcing that it would "presume facilities located in deep water [more than 200 meters] are primarily engaged in gathering or production."[9]

As with onshore facilities, the use of the primary function test, as modified by the policy statement for deepwater facilities, seems to be workable, and there has been relatively little controversy concerning its application in recent years. Efforts to apply the primary function test to offshore facilities in the shallow OCS, however, have been contentious.

B. The Sea Robin Pipeline

Difficulties applying the primary function test to offshore facilities were highlighted by the Commission's decision in *Sea Robin Pipeline Company* (*Sea Robin*). [10] Sea Robin's offshore pipeline facilities were certificated as jurisdictional transmission facilities by the Commission in 1969. The system consists of 438 miles of pipeline that transports unprocessed gas from shallow water on the OCS to a processing plant onshore. The system is configured in the form of a "Y". Along the two arms of the "Y", 45 lateral

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[8] *See Amerada Hess*, 52 FERC at 61,988 (1990).

[9] *See* 1996 Policy Statement, note 1 supra.

[10] 71 FERC ¶61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996).

lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms, or at subsea taps. Through those upstream arms, Sea Robin moves the gas to a manned platform with two turbine compressor units at the fork of the "Y" closer to shore. The bottom line of the "Y", from the platform to shore, consists of 66.3 miles of 36-inch pipeline. Along this segment the gas is mingled with additional gas from four platforms.

In response to a request to reclassify the Sea Robin facilities from transmission to gathering, the Commission found that the primary function of Sea Robin's entire system was and continued to be jurisdictional transportation. In reaching that conclusion, the Commission emphasized the length and size of Sea Robin's pipeline, and also certain non-physical factors, such as the reliance of shippers in the original jurisdictional determination. The U.S. Court of Appeals for the Fifth Circuit remanded that decision.[11] In doing so the court said the Commission had relied too heavily on the size of Sea Robin's system as a determinative factor and did not give enough consideration to the different nature of gathering on the OCS. The court also faulted the Commission for reliance on non-physical considerations, such as Sea Robin's ownership and shipper expectations. The court specifically found that the Commission's consideration of a "regulatory gap" in the absence of Natural Gas Act jurisdiction was inappropriate: "Need for regulation cannot alone create authority to regulate." [12]

In its decision, the court suggested that the primary function test could be adapted to the operational characteristics of the OCS, so that portions of its system could be considered to be predominantly gathering and other parts predominantly transportation. On remand, then, the Commission adopted this

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[11] *Sea Robin Pipeline Company v. FERC*, 127 F.3d 365 (5th Cir. 1997).

[12] *Id.*at 371.

suggestion and reformulated the primary function test to draw the jurisdictional line at an internal point on the Sea Robin system, at the junction of the "Y".[13] The Commission concluded that the part of Sea Robin's pipeline facilities from the platform to shore was a jurisdictional transportation system. Upstream of that point the two legs of the "Y" formed a non-jurisdictional gathering system.

In reformulating its primary function test, the Commission concluded that the "behind-the-plant" factor is not necessarily determinative of where gathering ends when applied to offshore facilities. In addition, the Commission announced that

> where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems.[14]

Although not all OCS pipeline systems exhibit such a centralized aggregation point, e.g., facilities with a straight-line or spine-and-lateral type configuration, the presence of such a location would be considered the offshore analogue of the onshore "central-point-in-the-field" criterion.

The Commission's decision on remand, based on its reformulated test that included the central point of aggregation as a factor offshore, was upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *Exxon* (note 4 *supra*).[15]

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[13] *Sea Robin Pipeline Company, Order on Remand*, 87 FERC ¶ 61,384 (1999) (Comm. Bailey dissenting), *rehearing denied*, 92 FERC ¶ 61,072 (2000).

[14] 87 FERC at 62,248.

[15] *See also Williams Gas Processing - Gulf Coast Company, L.P. et al. v. FERC*, No. 01-1327 (D.C. Cir. June 20, 2003).

C. The "Reformulated, Modified Primary Function Test"

Despite the several modifications of the primary function test described above, its utility in identifying nonjurisdictional gathering facilities remains uneven. As mentioned, the rule seems to work fairly well onshore, possibly because where other factors are not conclusive, there is usually a processing plant located at the end of a gathering system that serves as a logical demarcation point between jurisdictional and non-jurisdictional systems. Also, after an initial round of decisions interpreting the 1996 Policy Statement applying the primary function test to facilities located in deep water beyond the OCS, there has been relatively little controversy. In the shallow areas on the OCS, on the other hand, the status of facilities remains unsettled. The Commission continues to receive requests to reclassify jurisdictional transmission facilities as gathering, over the objection of customers who have been served through the facilities. In these types of cases, the correct interpretation of the primary function test is usually the main issue.

Based on the number of contested cases presented to us, we are concerned about the high degree of uncertainty that seems built into the primary function test as applied offshore. The primary function test lists numerous factors for consideration, with no one factor having priority. Thus, for example, the size of a particular system may suggest that it is transmission, but the configuration may suggest gathering. The primary function test does not indicate how such inconsistencies should be resolved. The result, over time, has been the gradual reclassification of more and larger systems as gathering, even in cases where systems had been regulated for many years under the Natural Gas Act. Systems with generally similar physical characteristic may have a different regulatory status because of relatively minor physical differences. This result can produce different regulatory results for competitors who perform essentially the same economic

function. It is also seems unfair to customers who may have made investments relying on the regulated status of a transporter, only to find themselves subject to the market power of that transporter in its new deregulated form. The "need for regulation" may not create authority to regulate; on the other hand, inconsistent classification and regulatory treatment cannot be what Congress intended when it established a comprehensive scheme of federal regulation that included transportation from the OCS.

Public Conference

The Commission is convening a public conference to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the regulatory goals of the Natural Gas Act. (The conference will not include the policy adopted for deepwater facilities in Docket No. RM96-5-000.) A new test should ensure that similar facilities are subject to similar regulatory treatment. It should also provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated market power of third party transporters. Persons who appear at the conference should be prepared to indicate how the Commission's definition of gathering can be changed to achieve these goals. Persons seeking to make formal statements at the public conference should be prepared to address questions set forth below. Other questions may arise during the course of the proceedings.

Questions

1. To what extent should a gathering test that be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?

2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?

3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?

4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas act before the facilities may be transferred to another company?

Procedures

The public conference convened by this notice will be held on September 23, 2003 at the offices of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. All interested persons are invited to attend. Persons interested in speaking or making a presentation should indicate their interest no later than September 3, 2003 by a letter addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and should refer to Docket No. AD03-13-000. Each request to participate must include the name of a contact person, their telephone number and e-mail address. There is no need to provide advance notice to the Commission simply to attend the conference.

Comments addressing the questions set out in this notice may also be filed by September 3, 2003. Every effort will be made to accommodate requests to make presentations, but depending on the number of requests received, a limit may

have to be placed on the number of presenters and the time allowed for presentations.

Members of the Commission intend to participate in the public conference and will reserve time for questions and answers. In a subsequent notice, we will provide further details on the conference, including the agenda and a list of participants, as plans evolve. For additional information, please contact Gordon Wagner, Office of General Counsel, phone 202-502-8947, e-mail: gordon.wagner@ferc.gov.

Magalie R. Salas
Secretary

APPENDIX B

Excerpts from Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*

43 U.S.C. § 1332 (2003)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;

(2) this Act shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g) [43 U.S.C. § 1337(g)], will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf[.;]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1334 (2003)

§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations.

The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

> **(1)** for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for

use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or

permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph [enacted Sept. 18, 1978], such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C.§ 7401 *et seq.*), to the extent that activities authorized under this Act significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases.

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

(c) Cancellation of nonproducing lease.

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease.

Whenever the owner of any producting lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

(e) Pipeline rights of way; forfeiture of grant.

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act [43 U.S.C. § 1347(b)]) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

(f) Competitive principles governing pipeline operation.

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production.

(1) The leasee [lessee] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes.

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas.

After the date of enactment of this section [enacted Sept. 18, 1978], no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there

is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas.

(1) Findings. [(A)] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects. The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

43 U.S.C. § 1349 (2003)

§ 1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security.

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

> **(A)** prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or
>
> **(B)** if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act, or the terms of any permit or lease issued by the Secretary under this Act, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions.

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this Act. Proceedings with respect to any such

case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court.

(1) Any action of the Secretary to approve a leasing program pursuant to section 18 [43 U.S.C. § 1344] of this Act shall be subject to judicial review only in the United States Court of Appeal [Appeals] for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this Act and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28, United States Code. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(d) [Repealed]

43 U.S.C. § 1350 (2003)

§ 1350. Remedies and procedures

(a) Injunctions, restraining orders, etc.

At the request of the Secretary, the Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney shall institute a civil action in the district court of the United States for the district in which the affected operation is located for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this Act, any regulation or order issued under this Act, or any term of a lease, license, or permit issued pursuant to this Act.

(b) Civil penalties; hearing.

(1) Except as provided in paragraph (2), if any person fails to comply with any provision of this Act, or any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under this Act, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than $ 20,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing. The Secretary shall, by regulation at least every 3 years, adjust the penalty specified in this paragraph to reflect any increases in the Consumer Price Index (all items, United States city average) as prepared by the Department of Labor.

(2) If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the

marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.

(c) Criminal penalties.

Any person who knowingly and willfully (1) violates any provision of this Act, any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under the authority of this Act designed to protect health, safety, or the environment or conserve natural resources, (2) makes any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under this Act, (3) falsifies, tampers with, or renders inaccurate any monitoring device or method of record required to be maintained under this Act, or (4) reveals any data or information required to be kept confidential by this Act shall, upon conviction, be punished by a fine of not more than $ 100,000, or by imprisonment for not more than ten years, or both. Each day that a violation under clause (1) of this subsection continues, or each day that any monitoring device or data recorder remains inoperative or inaccurate because of any activity described in clause (3) of this subsection, shall constitute a separate violation.

(d) Liability of corporate officers and agents for violations by corporation.

Whenever a corporation or other entity is subject to prosecution under subsection (c) of this section, any officer or agent of such corporation or entity who knowingly and willfully authorized, ordered, or carried out the proscribed activity shall be subject to the same fines or imprisonment, or both, as provided for under subsection (c) of this section.

(e) Concurrent and cumulative nature of penalties.

The remedies and penalties prescribed in this Act shall be concurrent and cumulative and the exercise of one shall not preclude the exercise of the others. Further, the remedies and

penalties prescribed in this Act shall be in addition to any other remedies and penalties afforded by any other law or regulation.

43 U.S.C. § 1801 (2003)

§ 1801. Congressional findings

The Congress finds and declares that—

(1) the demand for energy in the United States is increasing and will continue to increase for the foreseeable future;

(2) domestic production of oil and gas has declined in recent years;

(3) the United States has become increasingly dependent upon imports of oil from foreign nations to meet domestic energy demand;

(4) increasing reliance on imported oil is not inevitable, but is rather subject to significant reduction by increasing the development of domestic sources of energy supply;

(5) consumption of natural gas in the United States has greatly exceeded additions to domestic reserves in recent years;

(6) technology is or can be made available which will allow significantly increased domestic production of oil and gas without undue harm or damage to the environment;

(7) the Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource reserve which must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest;

(8) there presently exists a variety of technological, economic, environmental, administrative, and legal problems which tend to retard the development of the oil and natural gas reserves of the Outer Continental Shelf;

(9) environmental and safety regulations relating to activities on the Outer Continental Shelf should be reviewed in light of current technology and information;

(10) the development, processing, and distribution of the oil and gas resources of the Outer Continental Shelf, and the siting of related energy facilities, may cause adverse impacts on various States and local governments;

(11) policies, plans, and programs developed by States and local governments in response to activities on the Outer Continental Shelf cannot anticipate and ameliorate such adverse impacts unless such States, working in close cooperation with affected local governments, are provided with timely access to information regarding activities on the Outer Continental Shelf and an opportunity to review and comment on decisions relating to such activities;

(12) funds must be made available to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(13) because of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, the Federal Government must assume responsibility for the minimization or elimination of any conflict associated with such exploitation;

(14) the oil and gas resources of the Outer Continental Shelf are limited, nonrenewable resources which must be developed in a manner which takes into consideration the Nation's long-range energy needs and also assures adequate protection of the renewable resources of the Outer Continental Shelf which are a continuing and increasingly important source of food and protein to the Nation and the world; and

(15) funds must be made available to pay for damage to commercial fishing vessels and gear resulting from activities involving oil and gas exploration, development, and production on the Outer Continental Shelf.

43 U.S.C. § 1802 (2003)

§ 1802. Congressional declaration of purposes

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interest caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.

Supreme Court, U.S.
FILED
DEC 1 1 2003
OFFICE OF THE CLERK

No. 03-147

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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December 11, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S REPLY BRIEF

I. THE FERC'S PUBLIC CONFERENCE IS NO BARRIER TO REVIEW.

FERC's Public Conference in *Application of the Primary Function Test for Gathering on the Outer Continental Shelf*, Docket No. AD03-13-000 should not affect the Court's consideration of this petition.

Over a year ago, on October 25, 2002, FERC convened a public conference on natural gas markets in Docket No. PL02-9, which included a review of FERC's "offshore gathering policy." FERC received statements of position from all sectors of the industry, heard presentations by a panel of six witnesses (representing most of the parties to this case), and then received post-conference written comments in

which no participant supported the FERC's central point of aggregation test. Yet the FERC took no action to alter that test.

There is no reason to anticipate a different result from the current conference, which was held on September 23, 2003, yet has produced no word from the Commission. Moreover, an agency should not be able to evade this Court's review simply by announcing, while a petition is pending, an intent possibly to rethink the decision for which review is sought.

The crux of this case is that the FERC's central point of aggregation test and the court of appeals' approval of that test contravene this Court's ruling in *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84. 90 (1963), that "gathering" under § 1(b) of the Natural Gas Act ("NGA") is "narrowly confined to the physical acts of * * * preparing the gas for the first stages of distribution." The Commission's post-petition decision to "explore" that very issue is no reason to deny review.

Respondents opposed review of the FERC's earlier orders in *Sea Robin*[1] on grounds of asserted "prematurity" since the newly classified gathering lines in that case continued to be subject to the Commission's "in connection with" rate jurisdiction. Here, however, the subject Transco facilities have been transferred to a non-jurisdictional affiliate and are thus beyond the FERC's jurisdiction. Accordingly, neither the Commission's public conference nor prematurity concerns bar review of the decision below.

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[1] *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 (1999), *order denying reh'g*, 92 FERC ¶ 61,072 (2000), *aff'd sub nom ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002), *cert. denied*, 124 S. Ct. 48 (2003).

II. THE FERC'S ORDERS CONFLICT WITH THIS COURT'S INTERPRETATION OF § 1(b) OF THE NGA IN *NORTHERN NATURAL*.

The FERC does not really contest our point that its chosen dividing line between gathering and transportation on Transco's offshore systems has nothing to do with where gas on these pipelines is physically prepared for the first stages of distribution. Instead, as if verbiage were virtue, FERC argues (Opp. at 13) that its "orders exhaustively reviewed the relevant physical factors and specifically found that some (but not all) of Transco's systems were engaged in gathering." But the number of factors considered or the pages devoted to analysis are irrelevant if the result does not define the end point of gathering in reasonable proximity to the point where the gas is prepared for the first stages of distribution.

Moreover, FERC *did not* examine all of the relevant factors, because it gave no consideration to where the gas on Transco's offshore facilities is prepared for the first stages of distribution, as directed by *Northern Natural*. As we point out below, that point is located at or near the production platforms just upstream of Transco's former facilities where the gas is separated to remove free water and (if necessary) dehydrated to remove excess water vapor so that it will be acceptable for carriage on Transco's pipelines.

The NGA exempts only gathering lines, and we know from *Northern Natural* both that the exemption must be narrowly confined and that gathering has to do with physical acts of preparing the gas for the first stages of distribution. Because no physical preparation of the gas occurs at or near any of FERC's selected demarcation points on Transco's facilities, the FERC's orders below are contrary to the statute.

Respondents suggest (FERC Opp. at 12; Williams Opp. at 6-7) that this Court's interpretation of § 1(b) no longer holds because the "unbundling" of gas services in the interstate

market requires deference to the FERC's contrary interpretation. But only this Court can declare *Northern Natural* obsolete. *Chevron*[2] deference does not license the FERC to interpret the statute differently from settled law, no matter how many factors the FERC offers in support of its view. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.").[3]

III. THE LIMITED REGULATION OF PIPELINES UNDER § 5(f) OF THE OCSLA IS IRRELEVANT TO THE NEED FOR REVIEW OF THE FERC'S JURISDICTIONAL TEST UNDER THE NGA.

Respondent Williams asserts (Opp. at 9-11) that shippers on OCS pipelines are compensated for the loss of rate protection under the NGA by the enactment in 1978 of § 5(f) of the Outer Continental Shelf Lands Act ("OCSLA"). As the FERC has recognized many times, however, § 5(f) does not fix rates but only requires open and nondiscriminatory access to OCS pipelines.[4] The OCSLA contains no provision

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[2] *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

[3] *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (the Court's settled interpretation of a statute trumps *Chevron* deference to an agency's interpretation); *Maislin Ind., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[4] *See, e.g., Transcontinental Gas Pipe Line Corp.*, ("*Transco*") 97 FERC ¶ 61,300 at 62,409 (Pet. App. 98a); *Transco*, 97 FERC ¶ 61,298 at 62,396 (Pet. App. 235a); *Transco*, 97 FERC ¶ 61,296 at 62,382 (Pet. App. 168a); *Trunkline Gas Co.*, 97 FERC ¶ 61,169 at 61,799; *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas or Facilities on the Outer Continental Shelf*, Order No. 639-A, III FERC Stats. & Regs. ¶ 31,103 at 31,686 (2000), *vacated, Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *aff'd, Williams Cos. v. FERC*, 345 F. 3d 910 (D.C. Cir. 2003) (recognizing that the OSCLA does not provide for rate regulation equivalent to that of the

analogous to §§ 4 and 5 of the NGA, requiring OCS pipelines to charge only "just and reasonable" rates on file with and approved by the Commission.

Indeed, Congress included a savings clause in § 5(f)(4) of the 1978 OCSLA Amendments to make clear that the addition of § 5(f) would not "limit, abridge, or modify * * * any other provision of law with respect to pipelines on or across the outer Continental Shelf." 43 U.S.C. § 1334(f)(4). That clause by itself demonstrates that Congress never intended that OCSLA § 5(f) could be viewed as a substitute for NGA §§ 4 and 5.

IV. RESPONDENTS MISCHARACTERIZE OUR POSITION.

Respondents criticize what they claim is our "novel view that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation." (FERC Opp. at 13; *see also* Williams Opp. at 15.) But that misstates our position, which is that transportation starts once the gas is delivered to a pipeline downstream of where the gas is treated on a platform to make it acceptable for transport to shore. That pipeline interconnection might be at the production or service platform itself or at a subsea tap downstream of the platform. Our view that gathering ceases at the pipeline interconnections located at or just downstream of such production or service platforms was precisely the FERC's view, for over three decades, in its exercise of jurisdiction over Transco's OCS pipelines.[5]

NGA). "Pet App." references are to the appendix in the companion case, *Shell Offshore Inc.* v. *FERC*, No. 03-431.

[5] Contrary to Respondents' contention (FERC Opp. at 13; Williams Opp. at 15), the result we seek is supported by, not in conflict with, *EP Operating v. FERC*, 876 F.2d 46 (5th Cir. 1989). That case held that gathering ended at the offshore platform where free water was removed and the gas was dehydrated, even though the platform was 51 miles from

In sum, the decision below is wrong; there are no impediments to its review; and the question presented is of paramount importance to the orderly and successful development of natural gas resources on the Outer Continental Shelf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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the production platform. 876 F.2d at 49. Thus the decision supports our view that lines that carry gas and free water are gathering lines, while lines that carry gas to shore after full separation of free water are transportation facilities.